MAINE REPORTS

136

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

AUGUST 3, 1938 TO JUNE 8, 1940

WATLER M. TAPLEY, JR.
REPORTER

PORTLAND, MAINE
THE SOUTHWORTH-ANTHOENSEN PRESS
Printers and Publishers
1940

THE SOUTHWORTH-ANTHOENSEN PRESS

PORTLAND, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. CHARLES J. DUNN, CHIEF JUSTICE[1]

HON. CHARLES P. BARNES, CHIEF JUSTICE[2]

HON. GUY H. STURGIS

HON. SIDNEY ST. F. THAXTER

HON. JAMES H. HUDSON

HON. HARRY MANSER

HON. GEORGE H. WORSTER[3]

[1] Died November 10, 1939

[2] Appointed Chief Justice November 21, 1939

[3] Appointed December 21, 1939

JUSTICES OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

HON. GEORGE H. WORSTER[1]

HON. ARTHUR CHAPMAN

HON. GEORGE L. EMERY

HON. HERBERT T. POWERS

HON. EDWARD P. MURRAY

HON. ALBERT BELIVEAU

HON. RAYMOND FELLOWS[2]

[1] Resigned December 21, 1939

[2] Appointed December 10, 1939

ATTORNEY GENERAL

HON. FRANZ U. BURKETT

REPORTER OF DECISIONS

WALTER M. TAPLEY, JR.

TABLE OF CASES REPORTED

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

JOSEPH CARRIER, ADMR. OF
ESTATE OF BERTRAND CARRIER

vs.

PAUL BORNSTEIN.

Androscoggin. Opinion, August 13, 1938.

DAMAGES. R. S., CHAP. 101, SECS. 9, 10, AS AMENDED.

The statute, as it applies in the particular instance, limits redress to compensation of the parents for the pecuniary effect upon them of the death of their child. This does not restrict recovery to the immediate loss of money or property. The words of the statute, allowing damages for "pecuniary injuries," look to the prospective advantages of a money nature, which have, in consequence of the premature death, been cut off.

Sentimental hurts, losses from the deprivation of society or companionship, wounds of the affections, any distress of mind, any grief, suffered by the beneficial plaintiffs, are not elements which may properly find reflection in damages.

A pecuniary loss or damage is a material one, susceptible of valuation in dollars and cents.

The sum given must be the present worth of the future pecuniary benefits of which the beneficiary has been deprived by the wrongful act, neglect or default of the defendant.

On general motion for a new trial by defendant. Action brought to recover damages for the death of a six year old boy. Jury verdict

for plaintiff in the sum of $4750. Defendant filed motion for new trial. Motion sustained. Verdict set aside. New trial granted. Case fully appears in the opinion.

John G. Marshall, for plaintiff.

Fred H. Lancaster, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. This action was brought under the authority of the death statute, which creates a right of action where at common law there was none. R. S., Chap. 101, Secs. 9, 10, as amended by P. L. 1933, Chap. 113; *McKay* v. *Dredging Company*, 92 Me., 454, 43 A., 29; *Anderson* v. *Wetter*, 103 Me., 257, 69 A., 105; *Danforth* v. *Emmons*, 124 Me., 156, 126 A., 821; *Field* v. *Webber*, 132 Me., 236, 169 A., 732. The plaintiff administrator gained the verdict. Defendant moves for a new trial, assigning general grounds. As regards liability, he, however, concedes that the jury finding is not disturbable. His sole urge is that the award of damages is exorbitant or extravagant to the point that the court should set it aside. The assessment is $4750.

Decedent was a boy six years of age. His next of kin, that term being here used to signify those persons related by blood, who take the personal estate of the deceased intestate, ("heirs" bear the same relation to realty,) are his parents. *McKay* v. *Dredging Company*, supra.

The statute, as it applies in the particular instance, limits redress to compensation of the parents for the pecuniary effect upon them of the death of their child. R. S., *supra*, as amended; *Graffam* v. *Saco Grange*, 112 Me., 508, 92 A., 649.

This does not restrict recovery to the immediate loss of money or property. The words of the statute, allowing damages for "pecuniary injuries," look to the prospective advantages of a money nature, which have, in consequence of the premature death, been cut off. *McKay* v. *Dredging Company*, supra.

Sentimental hurts, losses from the deprivation of society or companionship, wounds of the affections, any distress of mind, any grief, suffered by the beneficial plaintiffs, are not elements which

may properly find reflection in damages. *McKay* v. *Dredging Company*, supra; *Oakes* v. *Maine Central Railroad Company*, 95 Me., 103, 49 A., 418.

A pecuniary loss or damage is a material one, susceptible of valuation in dollars and cents.

Damages may not be given, in a case of this kind, by way of punishment, or through sympathy, or from prejudice, but as "a pure question of pecuniary computation, and nothing more . . . no matter who or what the survivors may be." *Gillard* v. *Lancashire, etc., Co.*, (1848) 12 L. T., (Eng.) 356; *Oakes* v. *Maine Central Railroad Company*, supra.

What loss, in cold and unimpassioned inquiry, as a monetary proposition simply, fairly inferable from all the evidence, has been sustained? *Williams* v. *Hoyt*, 117 Me., 61, 102 A., 703.

Such, in effect, was the ultimate issue of fact.

The sum given must be the present worth of the future pecuniary benefits of which the beneficiary has been deprived by the wrongful act, neglect or default of the defendant. *Oakes* v. *Maine Central Railroad Company*, supra; *Williams* v. *Hoyt*, supra.

The evidence on the subject of damages was meager.

The father, in witnessing, testified as to his son's age, but did not give his own, nor that of his wife; she herself did not testify. Rank and station, the character of living, whether the father was dependent upon his own earning capacity, are not in evidence.

The child had been to kindergarten, but whether he was bright, active and promising, of average intelligence, strength, obedience and health, no page of the printed record discloses. *Bowley* v. *Smith*, 131 Me., 402, 163 A., 539.

True, the time might come when this child would be bound by law to support his parents; even so, four brothers, and as many sisters, stand to bear such potential obligation, in proportion to ability, respectively. R. S., Chap. 33, Sec. 15.

Of course, the damages could not be specifically proven. *Oakes* v. *Maine Central Railroad Company*, supra. Some damage is presumed, though the dead child was young. *Curran* v. *Railway Company*, 112 Me., 96, 99, 90 A., 973. In general, the jury must be governed by probabilities, not merely possibilities. *Welch* v. *Maine Central Railroad Company*, 86 Me., 552, 570, 30 A., 116.

The record is persuasive that the verdict is, in amount, against the overwhelming weight of the evidence.

The motion for a new trial is sustained, the verdict is set aside, and a new trial granted.

The new trial should be limited solely to issues of damage.

Motion sustained.
Verdict set aside.
New trial granted.

CITY OF PORTLAND *vs.* HARRY L. SIVOVLOS.

Cumberland. Opinion, August 13, 1938.

MUNICIPAL CORPORATIONS. ORDINANCES. ELECTIONS.

According to statute local ordinances must, to be effective, be accepted by the voters, on major vote, at an election which shall have been duly called and sufficiently warned.

On call of an election, it is requisite that a warrant issue. In practice, warrants are usually addressed to a constable, who is commanded to warn the voters. It is exacted that the constable make a return.

Without a warrant, an election would not be a legal one. A return, too, is indispensable. Without a return, under the official signature of a constable—his sign-manual—the only competent evidence upon the question of calling the meeting would be lacking. It is the signature of the officer which authenticates a return and endows it with controlling character.

On report. Suit in equity to enforce provisions of a zoning ordinance of the City of Portland, adopted in the year 1926. Plaintiff city seeks judgment of injunction, and the issuance of a prohibitory writ, restraining the defendant from using an existing, nonconforming building, in a limited business zone. Report discharged. Cause remitted. Case fully appears in the opinion.

W. Mayo Payson,
George W. Weeks, for complainant.
Joseph E. F. Connolly,
Jacob Agger, for respondent.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. This equity case is presented on report. The pleadings, on the one side and the other, and the whole evidence offered and received below, force and effect restricted to such as this Court may find legally admissible, are reported, in expectation of a final decision of the cause. But, for reasons to be stated, the report is being discharged.

The suit is instituted to enforce provisions of a zoning ordinance, adopted originally in the year 1926. Plaintiff city seeks judgment of injunction, and the issuance of a prohibitory writ, restraining the defendant, allegedly a dealer at wholesale, or a jobber, in ale, beer and carbonated beverages, from using an existing, nonconforming building, in a limited business zone, for purposes of storage, sale or distribution of those commercial potables.

Defendant tacitly concedes that zoning regulations, deriving vitality from enabling statutes, and having substantial relation to public health, public safety, and the general welfare, would not transcend police power. R. S., Chap. 5, Sec. 137 (P. L. 1937, Chap. 127, does not apply to this case); *York Harbor Village Corporation* v. *Libby*, 126 Me., 537, 140 A., 382; *Chapman* v. *City of Portland*, 131 Me., 242, 160 A., 913; *Euclid* v. *Ambler Realty Company*, 272 U. S., 365, 71 Law Ed., 303, 47 S. Ct., 114.

He assails the instant ordinance, on the ground, among other things, that it was never lawfully adopted. Amendments thereto, (in or before 1930) without, it is contended, action of equal dignity to that essential for the enactment of the ordinance itself, are not involved in the present branch of controversy.

On the enactment of the statute, relied on as authority for the ordinance, the Legislature prescribed that, in advance of making it, opportunity should be afforded for public hearing, prior notice thereof to be given by newspaper publication. R. S., *supra*, Sec. 139.

Laying out of view, for the moment, all reference to preliminary hearing, and turning again to the statutes, it will be seen that local ordinances must, to be effective, be accepted by the voters, on major vote, at an election which shall have been duly called and sufficiently warned. The pertinent legislation, enacted first in 1925,

P. L., Chap. 209, Sec. 7, and amended in 1927, P. L., Chap. 172, Sec. 5, is now comprised in R. S., *supra*, Sec. 143.

On call of an election, it is requisite that a warrant issue. In practice, warrants are usually addressed to a constable, who is commanded to warn the voters. R. S., *supra*, Secs. 2, 6; Chap. 8, Sec. 68.

It is exacted that the constable make a return. R. S., Chap 5, (*supra*), Sec. 7.

Without a warrant, an election would not be a legal one. *Bucksport* v. *Spofford*, 12 Me., 487. A return, too, is indispensable. Without a return, under the official signature of a constable—his sign-manual—the only competent evidence upon the question of calling the meeting would be lacking. *State* v. *Williams*, 25 Me., 561; *Chapman* v. *Limerick*, 56 Me., 390; *Auburn* v. *Water Power Company*, 90 Me., 71, 78, 37 A., 335, and cases there collected. It is the signature of the officer which authenticates a return and endows it with controlling character. *Bass* v. *Dumas*, 114 Me., 50, 95 A., 286; *Mahoney* v. *Ayoob*, 124 Me., 20, 125 A., 146.

Records of the city, introduced by defendant into the record at the trial, show, relative to the calling of the election, a warrant (insisted incomplete), and a return, which the constable left unsigned.

In such connection, no more is told.

Though the record is silent on the subject of a warrant, the warrant itself might, notwithstanding it is unrecorded, be properly used, in evidence, to establish its own identity and efficacy. *Bucksport* v. *Spofford*, supra. So, too, the return. *Chapman* v. *Limerick*, supra.

In *Chapman* v. *Limerick*, supra, a decision announced in 1868, Mr. Justice Kent, in delivering the opinion of the court, says:

> "This case is before us on report, and we are at liberty to give the case such direction as right and justice may require. We are not satisfied that the officer cannot now sign the return, with his own hand, in the nature of an amendment under § 8 of c. 3, R. S. We therefore discharge this report and remit the case to the Court at *nisi prius*, with liberty to either party to move any amendment of the records or papers, . . . or to

supply any defect in the records or proof, reserving the determination of the legality or effect of such matters as in other like cases."

Precedent is analogous in principle.

The present report is discharged, and the cause is remitted to the single justice, with leave to either party to move any amendment, or furnish evidence to cure defects in proof, with reservation of determinative power, as in *Chapman* v. *Limerick*, supra.

Report discharged.
Cause remitted.

ELWIN J. KELLEY,

APPELLANT FROM DECREE OF JUDGE OF PROBATE.

Kennebec. Opinion, August 13, 1938.

COURTS. APPEAL. PROBATE COURT.

Exceptions ordinarily bring up questions of law.

Statute language is necessarily of prime importance on whether or not the case is properly before the Supreme Judicial Court sitting as a Law Court, and such court has only such powers as are conferred by statute.

Appeals, in distinction from exceptions, bring up questions of fact as well as of law.

In complaining to an upper court, either the Superior Court or the instant one, of injustice done by a subordinate court, the statute relative to the appeal is binding upon the court, and the parties, alike, and cannot be dispensed with to meet the circumstances of any particular situation.

Legislative requisition must be applied the same in all instances which come within it. When lack of jurisdiction is patent, proceedings stop. Without jurisdiction, a judgment would be merely void.

On exceptions. The appellant appealed from a decree of the Judge of Probate finding appellant in contempt of court for non

payment, as provided in a former decree, for support of appellant's minor child. Decision in the Superior Court on appeal being adverse to the appellee, she files exceptions bringing the matter before the Law Court. Case dismissed. Case fully appears in the opinion.

Grover Welch, for appellant.

William H. Niehoff, for appellee.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. A wife petitioned the Probate Court, under R. S., Chap. 74, Sec. 9, as amended by P. L. 1933, Chap. 36, that it order her husband to contribute to the support of their minor child.

After notice and hearing, the court decreed that, beginning with the fifteenth day of October, 1935, and continuing until otherwise ordered, the respondent pay his wife, for the child, three dollars weekly.

Two years later, on petition to enforce compliance, citation issued to the respondent, to appear and show cause why he should not be adjudged in contempt of court.

The proceeding was not one to preserve the power and vindicate the dignity of the court, nor for an act tending to obstruct the administration of justice, but, supplementary to the original decree, by virtue of statutory provision, purely and simply to coerce the paying of due and unpaid instalments of money.

The case being in readiness, the court took proof.

To the extent of sixty-six dollars, delinquency was determined. The fact thus ascertained was not more definitely set down. The printed record disclosed judgment of contempt of court, but no consequences to the contemnor. The mandate appears to have been: Let mittimus issue as prayed for. That mittimus issued is not, however, on the record.

The respondent made an appeal. Appeals lie to the Superior Court. R. S., *supra*, as amended.

In the appellate court, contention by appellee, that the adjudication of contempt was nonappealable, failed.

The husband had, subsequent to the Probate Court decree, and before the petition for auxiliary relief, filed, in the Superior Court,

a libel for divorce, with prayer for custody of the child. R. S., Chap. 73, Sec. 14, as amended by P. L. 1935, Chap. 38.

The appellate court found, as a matter of law, that, apart from support instalments which, when the libel was filed, had, to that time, actually fallen due, filing of the libel precluded further proceedings in the Probate Court.

The case was remanded for corrections accordingly.

To bring matters before this court, a still higher one, for review, appellee had exceptions. The bill was signed by the judge in testimony of its correctness.

Exceptions ordinarily bring up questions of law.

Statute language is necessarily of prime importance on whether or not the case is properly here.

The Supreme Judicial Court, while sitting as a Law Court, has such powers only as are conferred by statute. *Morin* v. *Claflin*, 100 Me., 271, 61 A., 782; *Heim* v. *Coleman*, 125 Me., 478, 135 A., 33; *Crawford* v. *Keegan*, 125 Me., 521, 134 A., 564; *Cheney* v. *Richards*, 130 Me., 288, 155 A., 642.

Regarding the cognizance of this class of cases, statutory provision is, in essence:

In complaining to an upper court, either the Superior Court or the instant one, of injustice done by a subordinate court, procedure shall be an appeal. R. S., Chap. 74, *supra*, as amended.

Appeals, in distinction from exceptions, bring up questions of fact as well as of law.

The statute is binding upon the court, and the parties, alike, and cannot be dispensed with to meet the circumstances of any particular situation. Legislative requisition must be applied the same in all instances which come within it. When lack of jurisdiction is patent, proceedings stop. *Thompson, Appellant*, 114 Me., 338, 96 A., 238. Without jurisdiction, a judgment would be merely void. *Lovejoy* v. *Albee*, 33 Me., 414.

Case dismissed.

WILLIAM H. MARTIN

vs.

CANADIAN PACIFIC RAILWAY COMPANY.

Penobscot. Opinion, August 13, 1938.

CARRIERS.

Where bill of lading after words "Delivering Carrier" contained words "Central New Jersey, Del.," railroad designated as delivering carrier was entitled only to make terminal service.

Switching service is not a line haul, but is an incident to a line haul.

As concerns interstate commerce, interpretation by the Commission of bills of lading binds State courts.

Exclusion of an exhibit that does not support the declaration in the writ is proper.

On exceptions. Hearing before a single justice without intervention of a jury. Plaintiff sought to introduce a certain exhibit, which was objected to by defendant. Exhibit excluded from evidence and as no other evidence was offered, the trial court declined to hear evidence of damage, and found for defendant. Plaintiff excepted. Exception overruled. Case fully appears in the opinion.

B. W. Blanchard, for plaintiff.

Edgar M. Simpson, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. The question for decision is whether a shipment, on May 1, 1931, in interstate commerce, of a carload of potatoes, was misrouted. Consignment had been by plaintiff, from Houlton, Maine, to his own order at Wilkes-Barre, Pennsylvania, "Notify J. Budnitskys & Sons." Defendant was the initial common carrier.

The traffic moved to destination, but notice to Budnitskys & Sons met refusal to accept delivery of the tubers.

On juryless hearing, right to exceptions reserved, plaintiff offered in evidence a copy of the bill of lading. In making up this bill, a printed form was used. The blank space which the word "Route" introduced was left unfilled. In the space next below, i.e., after the printed words "Delivering Carrier," was inserted "Central New Jersey, Del."; nothing more. This, plaintiff contended, signified shipper's intention that the Central New Jersey Railroad, as connecting terminal carrier, participate in the line haul, from some point of interchange to its rails, to the end of the route. He proposed to prove that a switch movement merely having been afforded that railroad, he himself was subjected to damage.

The bill of lading was marked for identification.

The exhibit was objected.

Objection was put on the ground that the exhibit did not, as a matter of law, exact routing as contended; and was at variance, to the prejudice of the defendant, in maintaining its defense on the merits, with averment by the plaintiff in the declaration in his writ.

Exclusion from evidence was ruled.

No evidence of any other contract of carriage was presented. The trial court declined to hear evidence of damage, and found for defendant.

Plaintiff excepted.

The use of "Del.," in connection with the designation of the Central New Jersey, did not manifest requirement that the carrier have a line haul. Whether such was thereby precluded, is not relevant to present inquiry.

Under the shipping instructions, the Central was entitled only to make terminal service. *Davis, Director General* v. *Cayuga Operating Co., Inc.*, 216 N.Y.S., 186, cited by defendant.

Switching service is not a line haul, but is an incident to a line haul. *Cummings, etc., Co.* v. *Minneapolis, etc., Co.*, 182 Iowa, 955, 166 N.W., 354.

Had the consignor desired, or wished to insist upon, a line haul for the Central, as well as terminal delivery by it, that could readily have been made known, specifically, by designating that road in the routing.

This conclusion accords with rulings of the Interstate Commerce Commission. *Standard Lumber Co.* v. *Cleveland, etc., Railway Co.*, 146 I.C.C., 631; *Traffic Bureau* v. *Virginian Railway Co.*, 191 I.C.C., 479; *Georgia Fertilizer Co.* v. *Atlanta, etc., Co.*, 200 I.C.C., 633.

As concerns interstate commerce, interpretation by the Commission of bills of lading binds State courts. *Pennsylvania Railroad Co.* v. *Clark Bros., etc., Co.*, 238 U. S., 456, 35 S. Ct., 896, 59 Law Ed., 1406; *Northern Pacific Railway Co.* v. *Solum*, 247 U. S., 477, 483, 38 S. Ct., 550, 62 Law Ed., 1221.

On his own statement, plaintiff had no cause of action. *Currie* v. *Cleveland*, 108 Me., 103, 109, 79 A., 19; *Oscanyan* v. *Winchester, etc., Arms Co.*, 103 U. S., 261, 26 Law Ed., 539.

The exhibit did not support the declaration in the writ; exclusion from evidence was proper. *Gragg* v. *Frye*, 32 Me., 283.

Exception overruled.

HAROLD L. COLLINS
(AMENDED TO ARTHUR L. COLLINS)

vs.

BUGBEE & BROWN COMPANY.

York. Opinion, August 13, 1938.

PARTIES. PLEADING AND PRACTICE.

It is well settled that courts have power over their process, and, subject to the rule that there must be something by which to amend, nearly all formal defects and clerical errors may be amended, not without limitation, but in sound discretion.

Misnomers, a term applied where there is a mistake in the word or combination of words constituting a man's name, and distinguishing him from other individuals, are, within the statute of amendment, correctible.

Discretionary rulings may, on occasion, be reviewed, but not when exercise of

the best judgment of the judge upon the occasion that called therefor, was guided by the law.

On exceptions and general motion for a new trial. Common-law action in tort, for personal injuries. Defendant generally objected to motion on part of plaintiff to amend plaintiff's name as contained in writ. Defendant's exceptions were reserved on allowance of motion. Verdict for plaintiff. Defendant filed general motion for new trial. Exceptions overruled. Motion overruled. Case fully appears in the opinion.

Hilary F. Mahaney,
Leonard Novick, for plaintiff.
Louis B. Lausier,
William P. Donahue, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. This common-law action in tort, for personal injuries, is presented by defendant on exceptions, and, as well, general motion to set aside the verdict.

As sued out, the writ named the plaintiff as Harold L. Collins. On the witness stand, plaintiff, in answer to a question, stated his name to be Arthur L. Collins.

Thereupon, motion to amend was made.

Defendant objected, but merely generally.

In ruling, the trial court judge spoke in this wise: "I am going to allow the amendment."

No suggestion of being taken by surprise, no request for indulgence to prepare the defense, no intimation that the plaintiff and his case could not be rightly understood, was interposed.

Exception was, however, reserved.

Counsel for defendant, on being directed by the judge to entitle his plea of the general issue "to conform to the writ as it appears after the amendment is allowed," filed a new plea accordingly.

There was joinder in issue.

Defendant contends, though the court granted leave to amend,

yet defect or error never was corrected, that no addition to or change within the existing writ was actually made.

The trial proceeded to decision of the facts by the jury on the erroneous assumption that the amendment had been formally approved.

Judge, counsel, parties, appear to have regarded what it had judicially been said might be done, as done.

On this score, plainly, defendant was not misled; it was not injuriously affected.

It is well settled that courts have power over their process, and, subject to the rule that there must be something by which to amend, nearly all formal defects and clerical errors may be amended, not without limitation, but in sound discretion. R. S., Chap. 96, Sec. 11.

Misnomers, a term applied where there is a mistake in the word or combination of words constituting a man's name, and distinguishing him from other individuals, are, within the statute of amendment, correctible. R. S., *supra*; *Fogg* v. *Greene*, 16 Me., 282; *Griffin* v. *Pinkham*, 60 Me., 123; *Wentworth* v. *Sawyer*, 76 Me., 434; *Berry* v. *Railway*, 109 Me., 330, 84 A., 740.

Discretionary rulings may, on occasion, be reviewed. *Charlesworth* v. *American Express Company*, 117 Me., 219, 103 A., 358; *Bourisk* v. *Mohican Company*, 133 Me., 207, 175 A., 345. But not when, as in this instance, exercise of the best judgment of the judge upon the occasion that called therefor, was guided by the law. *Charlesworth* v. *American Express Company*, supra; *Bourisk* v. *Mohican Company*, supra.

Regarding the motion:

On July 31, 1936, the day of the accident, plaintiff was about fifty-two years of age; he was a resident of East Pepperill, Massachusetts; his business was that of a plumber.

The jury, instructed, to the acquiescence of the parties, relative to legal principles which would be applicable to the facts they might find from the evidence, determined that plaintiff, while standing on the boardwalk of an ocean pier, in Old Orchard, Maine, awaiting the convenience of his wife, who was purchasing at a notions booth, sustained hurt, under circumstances entitling him to damages. The award was $488.16.

In the evidence, there was room for the triers to find that, as the

immediate result of negligence on the part of two employees of the defendant corporation, who were engaged in manually propelling, one of them drawing and the other pushing, a loaded truck, (of the type used by railroads at passenger stations,) along the walk, a wheel of the vehicle ran over plaintiff's right foot. Internal lateral ligaments, there was testimony, were thereby sprained.

Plaintiff himself was found free from any contributory negligence.

He testified, on the trial, that for nearly six weeks following the mishap, he could not attend to his usual affairs; that his arch, which "dropped," had been weakened; that he still suffered pain. Evidence was given of expenses incurred and time lost. Doctors gave testimony which might well have been accepted as corroborative, relative to the nature and extent of the hurt.

The printed record, it hardly need be said, sanctions no contention that the verdict is manifestly wrong. The evidence presented a question for the jury. *Shaw* v. *Bridge*, 135 Me., 516, 200 A., 505.

Exceptions overruled.
Motion overruled.

ANNIE LAURA ROSE, ADMINISTRATRIX

ESTATE OF JACOB W. SILLIKER,

IN EQUITY

vs.

GEORGE OSBORNE, JR.

Androscoggin. Opinion, August 16, 1938.

EQUITY. APPEAL.

The word "form" is the antithesis of "substance." Substance is that which is essential. Form relates to technical defects, or noncomformance to mandate. Substance goes to matters which do not sufficiently appear, or prejudicially affect the substantial rights of parties who may be interested therein; not to mere formalities.

Revised Statutes, Chapter 91, *Section* 53, *provides that the single justice shall enter a decree in accordance with the certificate and opinion of the Law Court. Such is the extent of power. The justice has no authority to depart in any material respect from the Law Court mandate.*

On exceptions. Action in equity by the Administratrix of Estate of Jacob W. Silliker against George Osborne, Jr. to recover deposits in savings accounts. Defendant excepts to decree entered. Exception overruled. Case fully appears in the opinion.

Berman & Berman (Lewiston, Maine), for plaintiff.

Ralph W. Crockett, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. The plaintiff was appointed by a probate court in this State, to settle the estate of a Maine decedent. As administratrix, she sued defendant, a resident of this jurisdiction, with whom subpoena was personally left in service, alleging that three savings bank deposits, all in defendant's name, are of moneys which, in her decedent's lifetime, even unto his death, belonged to him.

The bill sought to impose a constructive trust.

On hearing, the trial court sustained contention, in part. It found, and decreed, plaintiff entitled to the account in the Androscoggin County Savings Bank.

On appeal by plaintiff, this finding was upheld, but the Law Court reversed the lesser court respecting the account in the Mariners Savings Bank. No error was perceived concerning the account in the Savings Bank of New London. The Androscoggin bank is in Maine; both the others in Connecticut.

Law Court mandate indicated the entry of a decree to conform to that court's opinion. *Rose, Admx.* v. *Osborne*, 133 Me., 497, 180 A., 315.

Draft of decree was filed; defendant moved corrections; hearing was had; no decision was made.

Seemingly it came to plaintiff's attention that, prior to the granting of injunctive relief, operating on the person of the defendant, and enjoining him from disturbing the accounts, he had already made withdrawals from the Androscoggin and Mariners

banks, leaving the total deposits there less than the amount needed for performance of the trust.

$14,986.90, exclusive of taxable costs, appears to have been requisite.

A new bill, termed by plaintiff's counsel "supplemental" to the first, was filed.

The aim of this was to compel the doing, by defendant, of an affirmative act, that is to say, to require him to make up, from the deposit in the Savings Bank of New London, any deficiency in trust funds. That deposit had, in the original proceeding, been adjudicated his.

The cause, inclusive of a motion for a single decree on both the original and supplemental bills, the latter having meantime been heard but not decided, was reported, as a single case, to this court. The report was discharged, on the ground that, the first bill having already been determined, finally, the sitting justice should decree; while the supplemental bill, depending on what might be its nature, either would not lie, or was premature. The record presented nothing for action. *Rose, Admx.* v. *Osborne*, 135 Me., 467, 199 A., 623.

Going back to the first suit, another draft of decree was filed. Had this, as drawn, been made operative, defendant would thereby have been ordered to transfer, from his aforesaid individual funds, in object as above. In other words, accomplishment, indirectly, of what it had been authoritatively concluded should not be done, was essayed, but unavailingly. The justice below denied approval.

A decree requiring transfer of the moneys in the Androscoggin and Mariners banks, minus any mention of that in the New London bank, was then signed and entered.

Plaintiff, feeling aggrieved by the form of decree, noted exception. Equity Rule 28, 129 Me., 526, 533.

The word "form" is the antithesis of "substance." *Thibodeaux* v. *Thibodeaux*, 112 La., 906, 36 So., 800. Substance is that which is essential. *State* v. *Burgdoerfer*, 107 Mo., 1, 17 S. W., 646. Form relates to technical defects, or noncomformance to mandate. Substance goes to matters which do not sufficiently appear, or prejudicially affect the substantial rights of parties who may be interested therein; not to mere informalities. *Thibodeaux* v. *Thibodeaux*, supra.

Revised Statutes, Chapter 91, Section 53, provides that the single justice shall enter a decree in accordance with the certificate and opinion of the Law Court. Such is the extent of power. The justice has no authority to depart in any material respect from the Law Court mandate. *Rose, Admx.* v. *Osborne*, second decision, *supra.*

What the justice did was right.

Exception overruled.

JIMMY LYNCH *vs.* NARCISSE JUTRAS

AND

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION.

Androscoggin. Opinion, August 17, 1938.

WORKMEN'S COMPENSATION ACT.

Where an employee is in fact injured in some way other than that known to him and is awarded compensation simply for the known injury, a decree for such will not conclude him in a later petition for further compensation on account of a previously unknown compensatory injury, even though he should have known of it. Only that decided as to the known injury would be res adjudicata.

When the commissioner finds the facts in favor of a petitioner, in the absence of fraud, the finding is final if there is any legal evidence, however slender, to sustain it.

It is undoubtedly true that when a hearing has been had on the merits and a decree either awarding or denying compensation has been entered, the Commission is without power to reopen the case and modify its finding because of error.

While the statute on which this petition is based permits the award of further compensation, yet, it does not go to the extent of making it possible to award such compensation prior to the date of an intervening petition on which a decree is made denying compensation. It does not permit a petitioner to nullify a judgment of non-recovery of compensation to a definite date.

On appeal. Appeal from *pro forma* decree of a Justice of the Superior Court, confirming a decree of the Industrial Accident Com-

mission awarding "further compensation" to the petitioner. Compensation was allowed for total incapacity, and petitioner, upon learning that he had received injuries additional to those previously considered by the Industrial Accident Commission filed a petition for further compensation. From a decree allowing compensation therefor defendants appeal. Appeal sustained, but for the sole purpose of modifying the decree to conform with the opinion. The court below to fix employee's expenses on appeal. Case fully appears in the opinion.

Alton A. Lessard,
Brann & Isaacson, for appellee.
Benjamin L. Berman, for appellant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. Appeal from *pro forma* decree of a Justice of the Superior Court, confirming a decree of the Industrial Accident Commission awarding "further compensation" to the petitioner.

On May 22, 1931, while working for defendant Jutras, petitioner Lynch received an injury to his back, resulting from an accident in the course and arising out of his employment. In the original petition the injury was described as "Piece of tar road-bed fell on back while stooping down. Bruised back."

On July 11, 1931, an agreement as to compensation was entered into (approved by the Commission on July 17, 1931), whereby the petitioner was allowed compensation for total incapacity of $18 per week from May 29, 1931 to June 20, 1931, both dates inclusive. The petitioner returned to work June 22, 1931 and continued working through July 25, 1931 when he quit.

On the 11th of the September following, he filed a petition for further compensation on account of the accident of May 22, 1931, setting forth his injury as "bruised back." This was dismissed by the Commission under decree dated October 28, 1931 because it found that his then incapacity was due to an accident that happened on July 21, 1931. It also found that he had recovered from the May 22nd accident.

On the same October 28th, he filed another petition for compen-

sation on account of the July 21st accident. This was also dismissed because the defendant was not then an assenting employer.

Not until March, 1937, did the petitioner learn that in the accident of May 22, 1931 he had received injuries additional to those previously considered by the Commission, these consisting of fractures of the transverse processes of the third and fourth lumbar vertebrae on his left side. Then, on March 25, 1937, he filed the pending petition asking for further compensation on account of the newly discovered injuries. Upon hearing on this petition, the Commission allowed him for total incapacity $18 per week from July 27, 1931 to September 26, 1931, both dates inclusive; and for partial incapacity, $14 per week from September 27, 1931 to January 26, 1932, both dates inclusive, to the decree for which the employer took the appeal now before us.

It is contended the above mentioned decree of October 28, 1931 bars the award of further compensation on the pending petition. But see *Devoe's Case*, 131 Me., 452, 163 A., 789.

Section 37 of Chapter 55, R. S. 1930, so far as it is applicable, provides:

> "If after compensation has been discontinued, by decree or approved settlement receipt as provided by section forty-three hereof, additional compensation is claimed by an employee for further period of incapacity, he may file with the commission a petition for further compensation setting forth his claim therefor; hearing upon which shall be held by a single commissioner."

With reference to this statute, the court in *Devoe's Case*, supra, said:

> "The intent of this statutory provision is to permit the making by the parties of a settlement discontinuing compensation, or the entry of a decree to the same effect without thereby foreclosing the right of the employee to recover further compensation if he suffers a recurrence of trouble due to the injury, *or if it is discovered that compensatory injury exists, which at the time the final decree was entered, was unknown to the parties and therefore not considered by the Com-*

> *mission. Comer's Case*, supra. Such purpose is in accord with the liberal aim of the statute, which seeks on the broadest principles to provide a just recompense for those injured in industrial accidents." (Italics ours.)

The instant case comes within the cited principle of law, for here it was found by the Commission that, at the time of the entry of the final decree of October 28th and of the subsequent decrees above mentioned, the petitioner had a compensatory injury, then unknown to the parties and unconsidered by the Commission.

Counsel for the employer would distinguish *Devoe's Case*, supra, saying that in it "there was not, as here, a prior decree upon an intervening petition for the same purpose, expressly adjudicating that no disability of any character existed, resulting from the accident, and that a complete recovery had been made, and that whatever disability did subsequently ensue was due to a totally different and subsequent new accident."

In that case, subsequently to the filing of an agreement for compensation following the accident and before the filing of the final petition, a petition was filed to determine the petitioner's then incapacity. On this intervening petition the Commission decreed that it saw "no causal connection between the injury and the incapacity now claimed" and thus determined in effect that the incapacity resulting from the known injury did not then exist. While it is true that in *Devoe's Case* the intervening decree did not state as here that the employee had completely recovered from *the accident* (and perhaps, therefore, it was not necessary to state the principle as broadly as it did in construing the statute), yet it did say that further compensation could be awarded "if it is discovered that compensatory injury exists, which at the time the final decree was entered, was unknown to the parties and therefore not considered by the Commission." This statement clearly evinces that the court, considering the liberal aim of the Workmen's Compensation Act, was of the opinion that where an employee is in fact injured in some way other than that known to him and is awarded compensation simply for the known injury, a decree for such will not conclude him in a later petition for further compensation on account of a previously unknown compensatory injury, even though he

should have known of it. Consequently, the statement in the decree of October 28, 1931, that the petitioner had fully recovered from the accident, exceeded the necessity of decision on the issue before the Commission. Only that decided as to the known injury was *res adjudicata.* The unknown injuries can not be said to have been "considered by the Commission." For such, an award for further compensation may be had, provided, as stated in the statute, the petition be brought "after compensation has been discontinued by decree or approved settlement receipt."

Again, a claimed distinction is that in *Devoe's Case* there were two distinct injuries, while "in the instant case, we have one injury, namely to the back, with an error in diagnosis, . . ." This, however, may be answered simply by stating that herein the Commission found that there were in fact two injuries, a bruised back and the fractures, quite distinct.

Also, it is contended that the record lacks reliable evidence showing the petitioner's incapacity due to the accident subsequently to June 22, 1931. This, however, was determined as a fact by the Commission.

> "When the commissioner finds the facts *in favor* of a petitioner, in the absence of fraud, the finding is final if there is any legal evidence, however slender, to sustain it." *Orff's Case*, 122 Me., 114, 116, 119 A., 67.

Study of the record reveals legal evidence to sustain the aforesaid finding of fact.

The only other question is as to the time for which the petitioner is now entitled to an award for further compensation. May it cover any time preceding the date of the petition, on which the decree of October 28, 1931 was based? We think not and so hold. The basis for allowing further compensation in this case is only the statute above cited, for,

> "It is undoubtedly true that when a hearing has been had on the merits and a decree either awarding or denying compensation has been entered, the Commission is without power to reopen the case and modify its finding because of error." *Devoe's Case*, supra, on page 454 and cases cited therein.

While the statute on which this petition is based permits the award of further compensation, yet, as we construe it, it does not go to the extent of making it possible to award such compensation prior to the date of an intervening petition on which a decree is made denying compensation. It opens the door only part way, but not wide enough to allow a petitioner to enter and nullify a judgment of non-recovery of compensation to a definite date.

In conclusion, this case must be remanded for modification of the decree herein appealed from so that the petitioner may receive compensation only from September 11, 1931, the date of the petition on which the decree of October 28, 1931 was founded.

Appeal sustained, but for the sole purpose of modifying the decree to conform with this opinion.

Court below to fix employee's expenses on appeal.

CLAIR F. BENSON

vs.

THE INHABITANTS OF THE TOWN OF NEWFIELD.

York. Opinion, August 17, 1938.

SCHOOLS AND SCHOOL DISTRICTS. EVIDENCE. PLEADING AND PRACTICE. REFERENCE.

To constitute a legal employment of a teacher in a school union, there must be a nomination by the superintendent, an approval of the nomination by the committee, and an employment by the superintendent of the teacher so nominated and approved. The school committee has no authority to employ a teacher.

Facts found in reference under Rule of Court are final when supported by any evidence. From proven facts proper inferences may be drawn as a basis for determination of legal issues.

The superintendent of schools is a public officer and his acts in that capacity, so long as in line with the performance of his official duties, are presumed to be

done in accordance with law, for every person holding office or trust is presumed to perform his duties without its violation. This is a presumption and may be rebutted by the introduction of evidence.

When the superintendent of schools gave specific directions to the plaintiff as to the performance of his duties and he supervised the disbursement of school appropriations, including the payment of teachers, and, for a portion of the school year the plaintiff received his monthly salary, avouched by the superintendent, it must be inferred that he had full knowledge of what was being done and acquiesced in it, and from these facts proven it is entirely proper to draw the inference of plaintiff's employment.

After legal election of the plaintiff, it was the duty of the superintendent to employ the one elected and the presumption obtained that he performed his duties as required by law.

While only the superintendent could employ the teacher, the power of dismissal was vested alone in the committee, but only upon notice and investigation, and then he could be lawfully dismissed only for proven unfitness or for services it deemed unprofitable to the school.

The fact that plaintiff remained silent when told by one of the committee that he was entitled to a hearing constitutes neither an estoppel nor waiver. The legislature had provided the method of dismissal of teachers, a matter of general concern to the public. At such a meeting, it had a right to be heard as well as the teacher. The teacher, except by resignation, could not relieve the school committee from the full performance of its statutory duty.

In order for the school committee to dismiss a teacher because unfit to teach or whose services it deems unprofitable to the school, there is absolute necessity of due notice and investigation and that can not be dispensed with even by the teacher himself.

This case was tried on the theory that a valid contract was made with the superintendent of schools and it was not contended that a legal contract could have been made with the school committee. Under these circumstances, the parties must be deemed to have consented to have the matter determined by the Referee as though the declaration had been amended alleging the contract to have been made with the town by its superintendent of schools.

On exceptions. Action in assumpsit to recover damages for alleged breach of contract. Case tried before Referee. Defendants except to acceptance of Referee's report. Exceptions overruled. Case fully appears in the opinion.

Lincoln Spencer,

Joseph R. Paquin, for plaintiff.

Willard & Willard, for defendants.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. Action in assumpsit to recover damages for alleged breach of contract. It comes up on defendants' exceptions to the acceptance of the Referee's report.

Facts found by him are: that the plaintiff, without formal employment, acted as principal of the defendants' high school during the school year of 1935–1936; that on April 29, 1936, at a school board meeting attended by all of its three members as well as by the superintendent of schools, he was reelected for the ensuing school year of 1936–1937 at a salary of $1020; that thereat the superintendent did not formally nominate him nor thereafter formally employ him as principal; that he taught until the Christmas vacation with the knowledge and acquiescence of the superintendent, during which time he received his salary check regularly from the treasurer of the defendant town; that he received a letter from the superintendent dated December 28, 1936, stating that the committee had decided to ask him to resign, to which he replied verbally he would not; that one of the members of the school committee told him that he was entitled to a hearing if he so desired, to which he made no answer; that on January 5, 1937, at a meeting attended by two members of the committee and the superintendent, the committee voted to dismiss him; that there were no written charges preferred against him nor evidence heard at the meeting, of which he received no notice; and finally, that the plaintiff, being ready and willing to continue to teach, diligently attempted to obtain employment and failed, anyway to the extent of netting anything above the cost of search.

On these facts the Referee found a valid contract; the dismissal illegal; it being illegal, the contract breached; and recommended judgment for the plaintiff.

The defendants offered evidence tending to show that the contract of employment for the year 1936–1937 was conditional, which was excluded by the Referee.

As drawn, the declaration contained two counts, the first alleging that the contract of employment was made by the defendant

town by its school committee, and the second, by its servants and agents. The second count was abandoned.

The defendants objected first to the finding that the plaintiff acted as principal of the high school during the school year of 1935–1936 and to the Referee's statement that there was no evidence of a formal employment of him during that year and that the occupancy of the position by him was acquiesced in by all the officers of defendants. Whether justified or not, the defendants were not prejudiced by this finding and statement. Their counsel frankly states in his brief: "The question of employment during the year 1935–1936 is not material to the case, ..."

Other objections present in different form the general question whether, under the facts as found by the Referee, there was a legal employment of the plaintiff for the school year of 1936–1937.

As permitted under Chapter 19, R. S. 1930, the defendant town had combined with other towns and formed a school union. In Section 70 of said chapter, under subdivision (e), as amended by Chapter 9, P. L. 1935, it is provided that the superintendent of schools ". . . shall nominate all teachers subject to such regulations governing salaries and the qualifications of teachers as the superintending school committee shall make, and upon the approval of nominations by said committee he may employ teachers so nominated and approved."

The question is whether the election of a teacher by the school committee, his teaching thereunder, receiving from the superintendent of schools instructions as to his duties, payment of his salary regularly by the town, and his receipt of a letter from the superintendent asking for his resignation as high-school principal, constitute such facts as justified in law the conclusion of the Referee that a valid contract was entered into between the parties.

In order for the plaintiff to prevail, it was incumbent upon him to establish three things, namely: the making of a valid contract, its breach and damages. As to damages no question is raised.

Was there a valid contract? No agency for the promotion of the state's best interests and general welfare is of greater importance than the schools of the state. The education of its youth is paramount. It is highly essential that those who instruct our boys and girls in the plastic period of their lives be men and women of

character as well as possessed of educational qualifications. With this in mind, the legislature very properly saw fit to regulate the employment of teachers not only in the interest of the public but as well in that of the teachers themselves. So it provided that the actual employment should be preceded by an election of a nominee for the position. This gives an opportunity for a painstaking consideration of the proposed teacher's worthiness and qualifications. It places responsibility directly upon the members of the school committee and the superintendent of schools, each performing his statutory duty to the end that he who is best fitted be chosen.

The statute above mentioned, to wit: Subsection (e) of Section 70, Chapter 19, R. S. 1930, has been dealt with recently in *Michaud* v. *St. Francis*, 127 Me., 255, 143 A., 56, and there it was held that to constitute a legal employment of a teacher in a school union, there must be a nomination by the superintendent, an approval of the nomination by the committee, and an employment by the superintendent of the teacher so nominated and approved. The school committee has no authority to employ a teacher.

The defendants rely largely upon the Michaud case for their defense, for here they claim there was neither a nomination nor an employment by the superintendent. It is to be observed that a distinction obtains in the Michaud case, for therein the superintendent not only did not nominate the teacher, but actively opposed her employment.

True it is that the Referee herein found that there was no formal nomination nor formal employment by the superintendent, but, nevertheless, he found enough in the facts, as he thought, to justify him in determining that there was a valid contract of employment.

Facts found in reference under Rule of Court are final when supported by any evidence. *Brunswick Coal & Lumber Co.* v. *Grows*, 134 Me., 293, 186 A., 705; *Staples* v. *Littlefield*, 132 Me., 91, 167 A., 171; *Hawkins* v. *Maine and New Hampshire Theaters Co.*, 132 Me., 1, 164 A., 628; *Kliman* v. *Dubuc*, 134 Me., 112, 182 A., 160; *The United Company and Fay & Scott* v. *Grinnell Canning Co.*, 134 Me., 118, 182 A., 415; *Richardson* v. *Lalumiere*, 134 Me., 224, 184 A., 392. From proven facts proper inferences may be drawn as a basis for determination of legal issues.

What, then, did this Referee have on which to justify his finding

that there was a valid contract? The plaintiff had taught this school the preceding year. Nearly at its close, the committee met with full attendance and the superintendent likewise was present. A brief record of that meeting was made and is in the case. In it appears this:

"Teachers reelected as follows:

Prin. high Clair F. Benson $1020"

This record is signed by the superintendent of schools. The Referee, it would seem, from it alone could properly infer that, at this meeting attended by all who had authority as to the election and employment of a teacher, the services he had already rendered, his character, his qualifications, his fitness for the position, his salary, and his employment for the ensuing year were all discussed and given consideration.

The record didn't state (and it wasn't necessary that it should) that the superintendent actually nominated Mr. Benson as principal. As said in *Michaud* v. *St. Francis*, supra, on page 258, 143 A., on page 57:

> "It is not to be expected that boards of this kind act with great formality nor that their records are as full and explicit as those of a legislative body or of a court; and it undoubtedly often happens that the selection of teachers is made after a general discussion between the committee and the Superintendent in which all reach an agreement without a formal nomination having been made by the Superintendent and without a formal approval having been registered by the committee."

While he could not be legally elected unless nominated by the superintendent, because the statute so provides, yet in the absence of any evidence to the contrary, the Referee had a right to rely upon the presumption that that required by law to be done was done. The superintendent of schools was a public officer and his acts in that capacity, so long as in line with the performance of his official duties, are presumed to have been done in accordance with law, for every person holding office or trust is presumed to perform his duties without its violation. *The Inhabitants of Augusta* v. *The In-*

habitants of Vienna, 21 Me., 298, 303; *Treat* v. *Inhabitants of Orono*, 26 Me., 217, 219; *Inhabitants of New Portland* v. *Inhabitants of Kingfield*, 55 Me., 172, 178; *Snow* v. *Weeks*, 75 Me., 105, 107; *The Inhabitants of Bucksport* v. *Spofford*, 12 Me., 487, 491; *Cutting* v. *Harrington*, 104 Me., 96, 101, 71 A., 374; *Abbott* v. *City of Rockland*, 105 Me., 147, 149, 73 A., 865.

> "For the purpose of upholding proceedings, *ut res magis valeat, quam pereat*, many deficiencies, not inconsistent with what does appear, are supplied by presumption and intendment of law." *Inhabitants of Bucksport* v. *Spofford*, supra.

In *Treat* v. *Inhabitants of Orono*, supra, the court, speaking of a surveyor of highways, said:

> "The law presumes, that official persons conduct legally and perform their duties, until proof is made to the contrary."

In *Massachusetts Breweries Company* v. *Morris Herman*, 106 Me., 524, 76 A., 943, it is held that, in the absence of proof to the contrary, a replevying officer is presumed to have taken the bond required by statute.

This Court has held recently that the law assumes that government officers do their duty. *Perry* v. *Park Street Motor Corporation*, 127 Me., 365, 143 A., 274. Also see *Inhabitants of Wellington* v. *Inhabitants of Corinna*, 104 Me., 252, 71 A., 889; *Bishop* v. *Inhabitants of the Town of Hermon*, 111 Me., 58, 88 A., 86.

> "There is always a presumption that official acts or duties have been properly performed, and in general it is to be presumed that everything done by an officer in connection with the performance of an official act in the line of his duty was legally done, whether prior to the act, such as giving notice, or determining the existence of conditions prescribed as a prerequisite to legal action, or subsequent to such act." 22 C. J., Section 69, page 130, *et seq.*

In applying the principle of presumption to the acts of a county superintendent of schools, the court, in *Board of Education of City of Emporia et al.* v. *Shepherd et al.*, 135 Pacific Reporter (Kansas), 605, said:

". . . a departure from duty must be shown by the party seeking redress."

Still it is only a presumption and may be rebutted by the introduction of evidence. Here there was none.

The next question is whether the plaintiff, having been nominated by the superintendent, was employed by him. Here again the Referee found that there was no formal employment but there were very strong facts from which he could have an actual employment. The superintendent himself gave specific directions to the teacher as to the performance of his duties. Furthermore, in performance of his duty under the statute (see Subdivisions [b] and [d] of Section 70, Chapter 19, R. S. 1930), he supervised the disbursement of school appropriations, including the payment of teachers, and this plaintiff, for a portion of the school year—approximately half of it—received his monthly salary, avouched by this superintendent. As said in *Inhabitants of Town of Farmington* v. *Miner*, 133 Me., 162, 175 A., 219 (where it was claimed that the municipal officers, having drawn orders for payment of the rent, did not know of the hiring of an office for the superintendent of schools and that they never formally approved it). ". . . It must be inferred that they had full knowledge of what was being done and acquiesced in it," so here from facts proven it was entirely proper to draw the inference of employment.

Moreover, the superintendent by letter invited him to resign. But from what if not the principalship? After legal election of the plaintiff, it was the duty of the superintendent to employ the one elected and the presumption obtained that he performed his duty as required by law. The presumption here is strengthened by the fact that the superintendent, available as a witness, was not put on the stand to testify that this teacher was not employed by him. Strong facts were these from which the Referee could find both the nomination and employment by the superintendent.

The contract established, was it broken? His dismissal was in writing and is not denied. While only the superintendent could employ the teacher, the power of dismissal was vested alone in the committee, but only upon due notice and investigation, and then he could be lawfully dismissed only for proven unfitness or for services

it deemed unprofitable to the school. Chapter 19, Section 44, Par. III, R. S. 1930. As already said, the plaintiff received no notice whatever of the date of the meeting at which he was dismissed; no written charges were preferred against him; he was neither present nor represented by counsel; and so far as we have knowledge, no evidence was produced. The Referee could well find as he did, that the committee did not comply with the statute. In *Hopkins* v. *Inhabitants of Bucksport*, 119 Me., 437, 111 A., 734, the court said on page 440, 111 A., on page 735:

> "The authority given to the committee, to vacate a contract, being an authority given to those who represent one party only, must be strictly pursued according to the provisions of the statute, to have that effect."

The fact that the plaintiff remained silent when told by one of the committee that he was entitled to a hearing constitutes neither an estoppel nor waiver. The legislature had provided the method of dismissal of teachers, a matter of general concern to the public. At such a meeting, it had a right to be heard as well as the teacher. The teacher, except by resignation, could not relieve the school committee from the full performance of its statutory duty.

> "Where the object of a law is the good of the public as well as of the individual, such protection to the state cannot, at will, be waived by any individual, an integral part thereof. The fact that the individual is willing to waive his protection cannot avail. The public good is entitled to protection and consideration; and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good." 27 R. C. L., Section 3, page 907.

There remain to be considered two other objections. The Referee excluded testimony tending to show that the employment was conditional. We find nothing in the record indicating what the claimed condition was, if there were one.

One might think, if he went into the realm of conjecture, that it would have been claimed that there was a breach by the plaintiff of

a condition as to discipline or failure to follow the instructions of the superintendent, which would have been entirely legitimate provisions in the employment contract. In the Michaud case, the court said that the school committee might approve a nomination conditionally, which implies the right in the superintendent to employ conditionally. Nevertheless, under the statute (vide Par. III of Section 44 of Chapter 19, R. S. 1930), in order for the school committee to dismiss a teacher because unfit to teach or whose services it deems unprofitable to the school, there is absolute necessity of due notice and investigation and that can not be dispensed with even by the teacher himself. Now then, if there were conditions in this employment contract, which had to do with discipline or the failure to follow the instructions of the superintendent, they came within the statute and so, upon the failure of such conditions, if there were such, the teacher had a right to be heard and could not be dismissed without due notice and investigation upon the part of the school committee. The Referee ruled "as a matter of law that the employment of plaintiff could not be conditional to an extent which would enable the defendant or its officers to dismiss plaintiff without a hearing." To this ruling, on the record as it is, we think the defendants take nothing by their exception.

Finally, it is contended that the Referee's report should not have been accepted because the decision can not stand on the remaining count in the writ, alleging the making of the contract by the school committee. In *Clapp* v. *Cumberland County Power & Light Co.*, 121 Me., 356, 117 A., 307, the court said on page 359, 117 A., on page 308:

> "Strictly under the declaration there is no evidence upon which the verdict can be sustained; the negligence proved was not an issue under the declaration. But the point was not raised at the trial. If objection had been seasonably taken, an amendment would have been allowable. *McKinnon* v. *Ry.*, 117 Me., 239. The case having been fully tried, without surprise, so far as the record shows, to the defendant, we think that an amendment may be considered as made, *Wyman* v. *American Shoe Finding Co.*, 106 Me., 263, and the verdict allowed to stand."

The instant case was tried on the theory that a valid contract was made with the superintendent of schools and it was not contended that a legal contract could have been made with the school committee. Under these circumstances, the parties must be deemed to have consented to have the matter determined by the Referee as though the declaration had been amended, alleging the contract to have been made with the town by its superintendent of schools.

Exceptions overruled.

ETTA M. MARR *vs.* JOHN S. HICKS.

ELLSWORTH C. MARR *vs.* JOHN S. HICKS.

Oxford. Opinion, September 1, 1938.

NEGLIGENCE. MOTOR VEHICLES. NEW TRIAL.

The mere skidding of a motor vehicle does not of itself prove negligence of the driver. It may occur without fault. The circumstances as to the conduct of the driver taken altogether must be considered.

In considering a motion for a new trial the evidence must be viewed in the light most favorable to the plaintiffs. On the defendent is the burden of proving that the jury's verdict is manifestly wrong.

Asserted grounds for a new trial which are not argued must be treated as abandoned.

On motions for new trials. Actions by plaintiffs against defendant seeking damages resulting from collision of automobiles. Jury verdicts returned favoring both plaintiffs. Defendant filed motions for new trials. Motions overruled. Cases fully appear in the opinion.

Frank W. Bjorklund,
Alton C. Wheeler, for plaintiffs.
Frank T. Powers,
Robert B. Dow, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. Two cases tried together, and arising out of an automobile accident. Etta M. Marr, the plaintiff in one, was a passenger in the car driven by her husband, Ellsworth C. Marr, the plaintiff in the other suit. Mrs. Marr recovered a verdict of $1500 for pain and suffering and for loss of wages for her personal labor as an employee in a shoe shop. The latter element of damage is alleged in her declaration, and her right to recover therefor, if entitled to damages at all, is not disputed. R. S., Chap. 74, Sec. 3. The declaration in the writ of Ellsworth C. Marr alleges in two counts damages to the car owned and operated by him and loss of the services and consortium of his wife, with expenses in her behalf chargeable to him. A single verdict of $925 was rendered in his favor.

The cases come up on motions for new trials. There were no exceptions. The familiar rule by which the Court must be guided is succinctly stated in *Searles* v. *Ross*, 134 Me., 77, 181 A., 820, 821:

> "In considering these motions we must view the evidence in the light most favorable to the plaintiffs. On the defendant is the burden of proving that the jury's verdicts are manifestly wrong."

The accident happened on March 15, 1937 at about 3:30 P. M. No claim is advanced by the defendant that either of the plaintiffs was guilty of contributory negligence, and the evidence would not warrant such claim. The locus of the accident was on the white cement road near the southern end of the village of Norway. There was credible evidence, from which the jury would be justified in finding that the plaintiffs and two other passengers had just started from a gasoline filling station, and their car was travelling down grade on the right-hand side of the road. The cement construction is eighteen feet wide, but the travelled portion was narrowed two feet by snowbanks on either side. The roadway was straight for a considerable distance. Weather conditions were bad. There had been a fall of about three inches of wet, damp snow, very little of which remained on the roadway itself but the pavement, according to sev-

eral witnesses, including the defendant and a state highway officer called by him, was very slippery. The defendant, driving alone in a Ford car, admitted that he knew it was a very bad place, that the road seemed narrower there than anywhere else, and he was getting into the settled part of the village. The cars were in clear view when they were 250 to 300 feet away from each other. Testimony for the plaintiffs was that the defendant's car was first seen approaching somewhat to the left of the center line, that when about 150 feet distant, the defendant started to veer to his right when the car skidded sidewise for a space of forty feet and then straightened out, but kept on approaching without diminution of speed and collided with the plaintiffs' car head on. Other testimony estimated the defendant's speed at thirty to thiry-five miles an hour. The plaintiffs' car was practically stopped at the moment of collision. There was substantial agreement from all observers including the defendant, that his car bounced back from the force of the impact a distance of six or seven feet, while the plaintiffs' car was moved but an inch or two. After the collision the defendant's car was at rest almost entirely on his left-hand side of the way.

The version of the defendant is that he was travelling very slowly, approximately twenty miles per hour, on his right-hand side of the way when a rough spot was encountered, his car began to skid, he applied the brakes "pretty hard," the wheels locked and the car, absolutely uncontrollable, slid from thirty to forty feet into the car of the plaintiffs.

It is not unusual or uncommon under certain conditions for a car to skid and, for the moment, be out of control without fault on the part of its operator. Experience teaches the proper method to promptly end such skidding, and it might well be a jury question as to whether the defendant, a driver for fifteen years, was negligent in not adopting such method, or whether there had been time and opportunity to do so.

Further, the defendant admitted that he knew the abrupt and continued application of brakes to wheels travelling over a slippery surface would accentuate the tendency to skid and prolong its performance.

The case for the plaintiffs need not rest solely on these assumptions of negligence, however. The jury had a right to conclude

that the proven physical facts led to the rational inference that undue speed was a contributing factor; that the skidding had ended, and there had been reasonable subsequent opportunity to avoid the accident.

The statutory regulation affirms the rule of the common law, and makes manifest the duty resting upon automobile operators.

> "Any person driving a vehicle on a way shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing." R. S., Chap. 29, Sec. 69.

The defendant assumes that the evidence preponderates in support of the claim that skidding of his car continued to the moment of impact, and places reliance upon the contention that the courts have absolved drivers of motor vehicles from liability when skidding was an element, upon the ground that such involuntary action was unexpected and often due to causes beyond the control of the operator.

Ofttimes the expression has been used in judicial opinions that mere skidding of a motor vehicle does not of itself prove negligence of the driver. This is but a corollary to the rule that liability can not be predicated upon the mere happening of an accident. It does not necessarily imply negligence. It may occur without fault. Such, in effect, is the holding in the cases cited by the defendant including *Linden* v. *Miller*, 177 N. W., 909 (Wis.); *King* v. *Wolf Grocery Co.*, 126 Me., 202, 137 A., 62; *Morin* v. *Carney*, 132 Me., 25, 165 A., 166; *Williams* v. *Holbrook*, 216 Mass., 239, 103 N. E., 633; *Osborne* v. *Charbneau*, 268 Pac., 884, 64 A. L. R., 251.

There is no dissent to such holding. It is clearly pointed out as the position of our own Court, however, in *King* v. *Grocery Co.*, supra, that the circumstances as to the conduct of the driver taken altogether must be considered; while in *Morin* v. *Carney*, supra, it is noted that:

> "In the absence of anything to show the conditions which existed at the time, or of the manner in which the Carney car

was being operated, the fact of its skidding would not alone tend to prove the driver negligent."

Huddy on "Automobile Law," 9th Ed., Vol. 3–4, Sec. 68, states the rule thus:

"The mere fact of the skidding of a car is not of itself such evidence of negligence as to render the owner liable for an injury in consequence thereof, and whether the driver was negligent in his management of the machine is ordinarily a question for the jury." . . . "The skidding of an automobile may, however, clearly be the result of the driver's negligence, and where a traveler, in the exercise of reasonable care, is injured by such conduct on the part of the driver, he may ordinarily recover."

Again, in 5 Am. Jr., Automobiles, Sec. 273, we find the text:

"The inquiry in cases of skidding is as to the driver's conduct previous to such skidding. The speed of the automobile prior to the skidding and the care in handling the automobile, particularly in the application of brakes, are factors to be considered in determining whether or not there was an exercise of due care. This is particularly true where statutory provisions are involved. Extremely slippery streets require correspondingly greater care in operation."

Ziegler v. *Ryan*, 271 N. W., 767, a strikingly similar case to that under consideration in its factual aspects, quotes the foregoing statement with approval, and then says:

"Obviously, cases involving injury due to the skidding of an automobile are dependent upon the particular facts shown. However, the following cases each disclose a set of facts in many respects similar to those here involved, and in each instance the question of negligence of the driver was held to be a jury question: *Loftus* v. *Pelletier*, 223 Mass., 63, 111 N. E., 712; *Ortwein* v. *Droste*, 191 Ky., 17, 228 S. W., 1028; *Oakes* v. *Van Zomeren*, 255 Mich., 372, 238 N. W., 177; *Ledet* v. *Gottleber* (La. App.), 143 So., 71; *Davis* v. *Brown*, 92 Cal.

App., 20, 267 P., 754; *Barret* v. *Caddo Transfer & Warehouse Company*, 165 La., 1075, 116 So., 563, 58 A. L. R., 261.

There was no manifest error upon the question of liability in the verdicts of the jury.

The defendant in his brief further contends that the damages awarded were excessive. The motion filed in each case did not assign this as a reason for new trial. In *Reed* v. *Power Co.*, 132 Me., 476, 172 A., 823, it is said:

> "Asserted grounds for a new trial which are not argued, must be treated as abandoned."

With equal force it may be said that grounds for a new trial not asserted can not be considered, but as both sides have argued the question of damages, the Court has reviewed the evidence upon this point. The verdict for Ellsworth C. Marr of $925 for damages to his car, for expenses occasioned by disability of his wife and for loss of her services appears reasonable and temperate. The verdict for Etta M. Marr of $1500 for damages for her personal injuries, including loss of wages, likewise fails to justify the Court in disturbing it. The actual physical injuries were not severe. There were multiple contusions to her arms and legs and cuts on the forehead and head, with concussion of the brain. She, however, sustained a severe nervous shock and continued to suffer from hysteria and nervous debility. Her condition at the trial eight months after the accident, after giving brief testimony, was cause for excuse from further examination. There was medical evidence that her nervous condition was likely to continue and recovery therefrom was uncertain.

Motions overruled.

EARLE H. ROBERTS ET AL. *vs.* JAMES R. CYR.

Aroostook. Opinion, September 2, 1938.

LANDLORD AND TENANT. LEASES. EVIDENCE.

A lease does not take effect till it has been delivered, unqualifiedly, to the lessee or to one authorized to receive it.

In a popular sense, delivery of a lease implies a transfer from one person to another, of the tangible contract for the possession and profits of realty on the one side, and a recompense of rent or other income on the other.

A manual passing over of the contract is not indispensable. There may be a presumptive or constructive delivery.

Delivery is a fact question, rather than one of law, determined by intention.

Delivery is not controlled by any fixed and arbitrary formulary, but may be done by acts, or words, or both, with intent thereby to breathe vitality into the document of title.

The question of whether a lease has been duly delivered, or not, is one for the jury.

On exceptions. This action was brought for the specific recovery of a motion picture theater, and certain rights annexed to it, in a certain building. Presiding Justice directed a verdict for plaintiffs. Exceptions filed by defendant as to directed verdict and to rulings regarding admission and exclusion of evidence. Law Court passed only on exception regarding directed verdict. Exception sustained. Case fully appears in the opinion.

George F. Eaton,
Edgar M. Simpson, for plaintiffs.
Bernard Archibald,
David Solman, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. This action was brought for the specific recovery of a motion picture theater, and certain rights annexed to it, in the building of one George Ringuette, in Madawaska, Maine. Defendant pleaded the general issue; by way of brief statement, he denied plaintiffs' title, and set up, as tenant under a lease from the owner of the fee, right in himself to remain in tenure.

Plaintiffs rely on a leasehold created by the same lessor. Their lease is dated August 2, 1937, its term five years from that day; it is of public registry. R. S., Chap. 87, Sec. 14.

The trial court directed a verdict for plaintiffs.

The bill of exceptions challenges rulings regarding the admission of evidence, the exclusion of evidence, and the directed verdict.

Defendant was in actual possession and occupancy of the demanded premises. He offered in evidence, as his muniment, an unrecorded lease, older than plaintiffs', which had been produced, on notice, by its draftsman. The instrument appears to be signed by both parties, bears date January 8, 1936, and is for the term of three years, beginning with February 1, 1936, with a privilege of two years more. This lease, the trial court, on objection, shut out.

Plaintiffs claimed that defendant's possession of the property was at will, invariably. They contended that although there may once have been intent to convey to the defendant for a definite term, this was not consummated. They argue, on the authority of *Seavey* v. *Cloudman*, 90 Me., 536, 38 A., 540; *Bennett* v. *Casavant*, 129 Me., 123, 150 A., 319, and other recorded cases, that the granting of their lease terminated defendant's right to the possession of the property demised and let to them.

Objection to reception in evidence of defendant's lease was that: "There was no delivery to the defendant of the document itself, that is, no physical delivery of the paper on which the lease to the defendant was written, . . ."

A lease does not take effect till it has been delivered, unqualifiedly, to the lessee or to one authorized to receive it. *Camp* v. *Camp*, 5 Conn., 291, 300; *Charlton* v. *Columbia Real Estate Company*, 67 N. J. E., 629, 60 A., 192; *Whitford* v. *Laidler*, 94 N. Y., 145; *Feigenbaum* v. *Aymard*, (Cal. App.) 236 P., 156. See, in resemblance, delivery of a deed absolute. *Brown* v. *Brown*, 66 Me., 316; *Reed* v. *Reed*, 117 Me., 281, 104 A., 227; *Tripp* v. *McCurdy*,

121 Me., 194, 116 A., 217; *Gatchell* v. *Gatchell*, 127 Me., 328, 143 A., 169. Delivery has been called the life of a deed. *Chambers* v. *Chambers*, 227 Mo., 262, 127 S. W., 86, 137 A. S. R., 567. Delivery is as essential as the seal or signature of the grantor. *Brown* v. *Brown*, supra.

In a popular sense, delivery of a lease implies a transfer from one person to another, of the tangible contract for the possession and profits of realty on the one side, and a recompense of rent or other income on the other. Thompson, Real Property, Sec. 1073. This is the simplest mode of delivering a lease.

But a manual passing over of the contract is not indispensable. Actual tradition is not the sole evidence. There may be a presumptive or constructive delivery. *Witman* v. *Reading*, 191 Pa. St., 134, 43 A., 140; *McKemey* v. *Ketchum*, 188 Iowa, 1081, 175 N. W., 325.

For example: retention of possession of a lease by the lessor was held not conclusive evidence of nondelivery. *Oneto* v. *Restano*, 89 Cal., 63, 26 P., 788. Again, leaving a lease with the scrivener who prepared it, that a copy might be made for the lessee, was a sufficient delivery to make it binding. *Reynolds* v. *Greenbaum*, 80 Ill., 416. Where the conveyancer, with whom the deed had been left for delivery upon performance of certain conditions, gave it back to the lessor upon his declaring that he took it for the purpose of transmitting it to the lessee, there was warrant for finding a sufficient delivery to vest title in the lessee. *Regan* v. *Howe*, 121 Mass., 424. The opposite is when holding continues pending performance of a condition; then, in a legal sense, there is no delivery and the lease is inoperative. *Browning* v. *Haskell*, 22 Pick., 310. See, too, *Tatham* v. *Lewis*, 65 Pa. St., 65. Should a lessee, by formal assent or unequivocal acts, such as entering into possession of the real estate and making compensation therefor, treat the lease as in his possession, that might be enough on the score of delivery. Thompson, Real Property, Sec. 1073 (*supra*); *Witman* v. *Reading*, supra. See, also, *Atkins* v. *Atkins*, 195 Mass., 124, 80 N. E., 806.

Delivery is a fact question, rather than one of law, determined by intention. *Wadsworth* v. *Warren*, 12 Wall., 307, 20 Law Ed., 402. Delivery is not controlled by any fixed and arbitrary formulary, but may be done by acts, or words, or both, with intent thereby to

breathe vitality into the document of title. *Chambers* v. *Chambers*, supra; *Brown* v. *Brown*, supra.

The record reveals, on the subject of delivery of the lease, substantial conflict in evidence. The trial judge's preliminary factual determination that delivery of the lease had not been proven, wherefore, as a matter of law, it was not receivable in evidence, transgresses the standards which must confine the exercise of judicial discretion. On the testimony on the record, a discussion of which would be of no practical interest, the question whether the lease had been duly delivered, or not, should have been submitted to the jury.

The exception is good.

There is no occasion to pass on any other alleged errors. Some of them are of no great concern, and none is likely to arise on another trial.

Exception sustained.

FLORENCE WEYMOUTH,
WIDOW OF GEORGE A. WEYMOUTH, PETITIONER

vs.

BURNHAM & MORRILL COMPANY, EMPLOYER ET AL.

Franklin. Opinion, September 7, 1938.

WORKMEN'S COMPENSATION ACT.

When an Industrial Accident Commissioner finds the facts in favor of a petitioner, in the absence of fraud, the finding is final if there is any legal evidence, however slender, to sustain it. It is when the commissioner decides facts without evidence or upon illegal or inadmissible evidence, that an error of law is committed which the court is required to correct.

This rule is not applicable when the finding and decree of the commissioner is against the petitioner.

The great weight of authority sustains the view that the words "arising out of" mean that there must be some causal connection between the conditions under which the employee worked, and the injury which he received.

In order for the accident to arise out of the employment, the employment must have been the proximate cause of the accident.

On appeal. Appeal from a *pro forma* decree of a justice of the Superior Court denying an award of compensation under the Workmen's Compensation Act. Appeal dismissed. Decree below affirmed. Case fully appears in the opinion.

Sumner P. Mills,

Berman & Berman (Lewiston, Maine), for appellant.

Forrest E. Richardson, for appellee.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. Appeal from a *pro forma* decree of a justice of the Superior Court denying an award of compensation under the Workmen's Compensation Act.

The petitioner's husband, seventy years old and lame, was killed on the fourth day of September, 1937, while "in the course of" his employment with the defendant company. He worked as a mechanic in its corn factory at Farmington Falls. He lived from a third to a half of a mile distant therefrom and for conveyance to and fro used an old Model T Ford. The morning of the accident, he began work at 6:30 and worked until midnight. On that day he parked his car in an area used generally by the workmen for parking purposes. Parallel with the wall of the factory and near it was a ditch some two feet in depth and width. He left his Ford approximately three or four feet outward from the ditch, headed toward the factory. Upon leaving for home that night, he cranked his car and immediately it started ahead, struck and pushed him against the wall. He was injured seriously and died a few hours after being taken home.

The Ford had an old-style planetary transmission. The emergency brake was out of repair and it did not throw the clutch out as it should have done. So the car, when cranked, started ahead and caused the accident.

Two questions are presented. First, is the decision reviewable, and second, did the accident actually "arise out of" the employment?

FIRST: The commissioner found and stated:

> "While it was convenient for him to use his Ford truck in going to and from his work, we do not find that it was a necessity as he lived within a short distance of the factory in a village which had good streets and sidewalks and his lameness did not prevent him from walking about attending to the machines in the factory."

The employer contends that this was a finding of fact which, under the statute, is final in the absence of fraud (see Section 36, Chapter 55, R. S. 1930), and that if he were using his automobile unnecessarily, simply for his own convenience, the injuries received are not compensable.

> "When the commissioner finds the facts *in favor* of a petitioner, in the absence of fraud, the finding is final if there is any legal evidence, however slender, to sustain it. It is when the commissioner decides facts without evidence or upon illegal or inadmissible evidence, that an error of law is committed which this court is required to correct. *Gauthier's Case*, 120 Me., 78; *Mailman's Case*, 118 Me., 176.
>
> "But where as in this case the finding and decree of the commissioner are *against* the petitioner, no such rule prevails." *Orff's Case*, 122 Me., 114, 116.

So in the instant case, although this was a finding of fact, it was against the petitioner and does not come within the rule of finality.

It being reviewable, the case may be disposed of on the second ground now to be considered.

SECOND: Did this accident arise out of the employment? One of Maine's earliest cases to deal with the words "arising out of" employment is *Westman's Case*, 118 Me., 133, 106 A., 532, where it was stated on page 143, 106 A., on page 537:

> "The great weight of authority sustains the view that these words 'arising out of' mean that there must be some causal connection between the conditions under which the employee worked, and the injury which he received."

Cited therein is *Mitchinson* v. *Day Bros.*, 6 B. W. C. C., 191, holding that "'Nothing can come "out of the employment" which has not, in some reasonable sense, its origin, its source, its *causa causans*, in the employment.'" Then our Court continued:

> "It might with safety be said that, in order for the accident to arise out of the employment, the employment must have been the proximate cause of the accident."

Also cited is the leading Massachusetts *McNicol's Case*, 215 Mass., 497, 102 N. E., 697, wherein is this statement:

> "It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant."

In *Mailman's Case*, supra, on page 180 it is stated:

> "The accident must have arisen out of and in the course of the employment. In other words, it must have been due to a risk to which the deceased was exposed while employed and because employed by the defendant."

Also see *White* v. *Insurance Co.*, 120 Me., 62, 67, 68, 112 A., 841.

The accident must be traceable to the work. *Webber's Case*, 121 Me., 410, 117 A., 513. In *Saucier's Case*, 122 Me., 325, 119 A., 860, the Court emphasized the necessity of the employment being the proximate cause of the accident and discussed that principle at

some length. Likewise see *Gray's Case*, 123 Me., 86, where this Court, with citation of authorities, stated on page 88, 121 A., on page 557:

> "An injury is deemed to arise out of employment when there is apparent, on consideration of all the circumstances, the relation of cause and effect between the conditions under which the work is required to be performed and the resulting injury . . . ; when it is a direct and natural result of a risk reasonably incident to the employment . . . ; when it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business expose the employee . . . ; and when the injury may be seen to have had origin in the nature of the employment . . . ."

Then the Court said by way of disposition of that case that "Claimant's injury arose, not out of his employment as a contributing proximate cause, but in broadest view only in the course of that employment." In *Washburn's Case*, 123 Me., 402, 123 A., 180, *McNicol's Case*, supra, is cited to the effect that " 'The causative danger must be peculiar to the work and not common to the neighborhood,' " and it is said:

> "The statute cannot be legitimately construed in the light of providing that every accident that may happen to the employee, even while he is on the premises of his employer, shall be of its essence. Each case is to be decided upon the particular facts. And there must not be too clamorous insistence in pressing any claim beyond safe limits."

Also see *Healey's Case*, 124 Me., 145, 126 A., 735, dealing with proximate cause. *Fogg's Case*, 125 Me., 168, 132 A., 129, emphasizes that the causative danger must be incidental to the character of the employment. *Vide Mary M. Taylor's Case*, 126 Me., 450, 139 A., 478; *Sullivan's Case*, 128 Me., 353, 147 A., 431; *Veilleux's Case*, 130 Me., 523, 157 A., 926.

> "To rise out of the employment an injury must have been due to a risk of the employment, . . ." *Wheeler's Case*, 131 Me., 91, 93, 159 A., 331, 332.

Applying the law as enunciated in the foregoing cases, we are of the opinion that this accident did not "arise out of" the deceased's employment. Its cause was the cranking of the Ford while it was in a defective condition. The causative danger was not peculiar to the work and did not come out of the employment. It was a hazard to which the deceased would have been equally exposed apart from it. It was not a risk to which he was exposed because employed by the defendant. The injury received can not fairly be traced to the employment or conditions connected therewith as a contributing proximate cause. The accident not "arising out of" the employment is not compensable.

Appeal dismissed. Decree below affirmed.

STATE OF MAINE *vs.* WILLIAM CAREY.

Penobscot. Opinion, September 9, 1938.

STATUTES, CONSTRUCTION OF.

The act giving the Old Town Municipal Court exclusive jurisdiction over all criminal offenses and misdemeanors within the jurisdiction of trial justices within the towns enumerated in the act, was repealed pro tanto *by subsequent general laws authorizing trial of a violator of the inland fish and game laws by any trial justice or any municipal court in the county where the offense was committed or in any adjoining county.*

On report. The respondent was tried and found guilty by a trial justice of Orono in the County of Penobscot on a complaint and warrant charging a violation, at Alton, in Penobscot County, of a fish and game law. Presiding Justice certified the case to the Law Court on an agreed statement of facts. Case is remanded to the Superior Court for the entry of judgment for the State and the imposition of sentence. So ordered. Case fully appears in the opinion.

John T. Quinn, County Attorney, for State.

Albert G. Averill,

Artemus Weatherbee, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. The respondent in this case was tried and found guilty by a trial justice of Orono in the County of Penobscot on a complaint and warrant charging that on October 27, 1937, at Alton in that county he unlawfully offered for sale a deer in violation of Section 95, Chapter 38, R. S., as re-enacted in Chapter 60, P. L. 1937. On appeal to the Superior Court, his counsel raised the issue of the jurisdiction of the trial justice and the presiding Justice certified the case to the Law Court on an agreed statement of facts.

In a special Act appearing as Chapter 177 of the Private and Special Laws of 1887, a municipal court was established in and for the towns of Old Town, Milford, Bradley, Alton, Argyle, Greenbush and Greenfield in the County of Penobscot, to be called the Old Town Municipal Court, with original and exclusive jurisdiction over all criminal offenses and misdemeanors committed in either of said towns which were by law within the jurisdiction of trial justices, and subject to certain exceptions which are not here material, such magistrates were expressly restricted from exercising any criminal jurisdiction in these towns.

A few years later, the legislature, in Chapter 95 of the Public Laws of 1891, incorporated by way of amendment in the then existing Game Statute appearing as Chapter 30 of the Revised Statutes of 1883, the following section:

> "Sect. 16. Any officer authorized to enforce the fish and game laws may, without process, arrest any violator of any of said laws; and he shall with reasonable diligence, cause him to be taken before any neighboring trial justice in any county, for a warrant and trial; . . ."

In 1899, the laws pertaining to game and to inland fisheries, which up to that time had been kept separate and distinct and recorded respectively in Chapters 30 and 40 of the Revised Statutes of 1883 and Acts amendatory and additional thereto, were consolidated and revised and a single and complete code of law pertaining both to inland fisheries and to game was enacted in Chapter 42 of

the Public Laws of 1899 and as an amendment to Chapter 30 of the Revised Statutes of 1883. Except as fishing and hunting were prohibited in certain localities for certain periods of the year and closed time thereon established accordingly, the application of the consolidated law was made uniform and controlling throughout the state. As to its enforcement, the following provisions were enacted:

> "Section 51. Any officer authorized to enforce the inland fish and game laws may, without process, arrest any violator of any of said laws, and shall with reasonable diligence, cause him to be taken before any trial justice or any municipal or police court, in the county where the offense was committed or in any adjoining county, for a warrant and trial. . . .
>
> "Section 52. In all prosecutions under this chapter and the amendments and additions thereto, municipal and police judges and trial justices within their counties have, by complaint, original and concurrent jurisdiction with the supreme judicial and superior courts."

And as Section 2 of the amending Act, it was provided that:

> "All acts and parts of acts, whether so called public, or private and special, which are inconsistent with the provisions of this act . . . are hereby repealed."

We think there can be no real doubt as to the intention of the legislature when this law was passed. It was then, as now, common knowledge that violations of the fish and game laws often take place in remote parts of the state where no trial justices or municipal courts are located, and the taking of the violator before any particular magistrate or inferior court might be attended by great expense, long travel and much delay. It seems certain that it was the purpose of the law-makers in enacting the jurisdictional provisions of this Act of 1899 to establish a rule or system of procedure applicable to prosecutions for violations of the fish and game laws which obviated these difficulties and at the same time established and ensured uniformity throughout the state in the enforcement of the law. As to jurisdiction over violations of any of its provisions, the Act of 1899 included no exceptions in favor of the Old Town Muni-

cipal Court or any other inferior court or magistrate and was repugnant to any and all grants of exclusive jurisdiction over such offenses given prior thereto. Under the settled rules of construction, there is ground for holding that the general law appearing in Chapter 42, P. L. 1899, by implication repealed the provisions of the charter of the Old Town Municipal Court, which gave that tribunal exclusive jurisdiction over violations of the fish and game laws. *Starbird* v. *Brown*, 84 Me., 238, 24 A., 824; *Hunt* v. *Card*, 94 Me., 390, 47 A., 921; *Tibbetts* v. *Coombs*, 114 Me., 441, 96 A., 741; *Chase* v. *Scolnik*, 116 Me., 374, 102 A., 74. See 59 Corpus Juris 934 and cases cited. The repeal does not rest, however, on implication alone. By the provisions of this general law, all Acts and parts of Acts "whether so called public, or private and special" which were inconsistent were repealed. No reason is found for exempting from this all-inclusive repealing clause the inconsistent jurisdictional provisions contained in the special Act of 1887 establishing the Old Town Municipal Court. *Louisville Water Co.* v. *Clark*, 143 U. S., 1, 12 S. Ct., 346; *Tucker* v. *McLendon*, 210 Ala., 562, 98 So., 797; *Bozarth* v. *Egg Harbor*, 85 N. J. L., 412, 89 A., 920; *New Brunswick* v. *Williamson*, 44 N. J. L., 165; Sutherland Stat. Const., Vol. 1, Sec. 276.

Persons interested in the Old Town Municipal Court did not allow this situation to long continue. In 1903, an amendment to the original Act establishing this court was obtained from the legislature and exclusive jurisdiction over all criminal offenses and misdemeanors within the jurisdiction of trial justices, within the towns originally enumerated, was restored to that tribunal. Private and Special Laws, 1903, Chap. 153. Violations of the fish and game laws were not excepted from this provision. Why, we do not know. In view of the general law, the uniformity and extent of its application, and its obvious and recognized purpose, it is not inconceivable that the failure to except violations of the fish and game law from the exclusive jurisdiction of the Old Town Municipal Court was due to inadvertence and oversight. Under settled rules of statutory construction, however, the presumption is to the contrary, and, regardless of conjecture as to the reasons therefor, it must be presumed that the amendment to the charter of the Old Town Municipal Court was given a passage with full knowledge of

the existence of the provisions in the general law relating to prosecutions in criminal cases involving the fish and game laws. Endlich Int. of Statutes, Sec. 182, Note 1.

This suspension of the application of the general uniform law relative to prosecutions for violations of the fish and game laws was, however, short-lived and has no parallel in recorded legislation. In Secs. 54, 55, Chap. 32, R. S. 1903, a general revision of the statutes subsequent to but made in the same year that the amendment to the charter of the Old Town Municipal Court was passed, the provisions of Chap. 42, P. L. 1899 were re-enacted and again officers were authorized to take violators of fish and game laws before any trial justice or any municipal or police court in the county where the offense was committed, or in any adjoining county, for a warrant and trial, and such magistrates were given concurrent jurisdiction with the upper courts over such prosecutions. In 1913, in a special revision of the fish and game laws appearing as Chap. 206, P. L. 1913, the same provisions as to jurisdiction of magistrates over offenses against such laws were included, and all inconsistent acts and parts thereof, either public or private and special, were again repealed. This act was carried forward into the next revision of statutes as Secs. 84, 85, Chap. 33, R. S. 1916. And still again, in Chap. 219, P. L. 1917, jurisdiction over violations of the fish and game laws was again vested as before and generally in trial justices, police and municipal courts, and inconsistent private and special acts, as well as public laws, repealed. The same rule was restated in Chap. 331, P. L. 1929. And it appears without modification in Secs. 100, 101, Chap. 38, R. S. 1930, now in force.

As this review of the entire body of legislation bearing on the question of jurisdiction raised in this case discloses, the legislative abandonment in the amendment to the charter of the Old Town Municipal Court (P. & S. L. 1903, Chap. 153) of its general rule of procedure pertaining to prosecutions of violators of the Inland Fisheries and Game Law was temporary only and soon followed by repeated and continued re-enactments of the general rule. As repeatedly, inconsistent acts and parts thereof, private and special as well as public, were expressly repealed. The repugnancy between the jurisdictional provisions of that charter and those of the

Inland Fisheries and Game Law continued and an intention that the uniform rule or system of procedure in respect to prosecutions for violations of that law established in the general law should govern in such cases has been clearly manifested in all the latest legislative declarations. We are of opinion that the amended charter of the Old Town Municipal Court (P. & S. L. 1903, Chap. 153) has been as effectually repealed *pro tanto* by general laws enacted subsequent thereto as was the original act establishing that court (P. & S. L. 1887, Chap. 177) by the general laws which immediately followed it (P. L. 1891, Chap. 95; P. L. 1899, Chap. 42). The authorities cited in our consideration of the first repeal are fully applicable to that which came later and need not be restated.

It appearing, therefore, that any trial justice or municipal or police court in Penobscot County or in any adjoining county has jurisdiction over the offense which the respondent is charged with having committed in the Town of Alton, in accordance with the stipulations upon which this report is founded, the case is remanded to the Superior Court for the entry of judgment for the State and the imposition of sentence.

So ordered.

DWIGHT MARBLE AND HARRY SEAMON, TRUSTEES

AND JOHN V. O'CONNELL, BENEFICIARY

APPELLANTS FROM DECREE OF JUDGE OF PROBATE.

Androscoggin. Opinion, September 13, 1938.

TRUSTS. COURTS.

Findings of fact by a Justice presiding in the Supreme Court of Probate are conclusive and not to be reviewed by the Law Court if the record shows any evidence to support them.

Under the general obligation of carrying the trust into execution, trustees and all fiduciary persons are bound to conform strictly to the directions of the trust.

The trust itself, whatever it be, constitutes the charter of the trustee's powers and duties; it prescribes the extent and limits of his authority.

If a trustee, through non-feasance, omits to carry the trust into execution, or through misfeasance he disobeys the directions of the trust, he renders himself in some manner liable to the beneficiary whose rights have been thus violated.

If a beneficiary, of full age and sound mind, acting with full knowledge of the facts of the case and of his rights, and not under the influence of misrepresentation, concealment, or other wrongful conduct on the part of the trustee or another, consents that the trustee or a third person may perform an act or refrain from performing an act, equity will not permit the beneficiary to allege thereafter that the conduct of the trustee or third person to which consent was given was a breach of trust, or amounted to participation in a breach.

The rules for the administration of trusts, established by the trust instrument, statute, and court rules, are solely for the benefit of the cestui. If he voluntarily withdraws from their protection, when fully competent, he ought to be permitted to do so. He can not come into equity and complain of an act which he has expressly sanctioned without violating the "clean hand" doctrine of chancery.

Payments made by a trustee will also be credited to him on his accounting, if, while not made in the execution of powers given him by the settlor, a statute, or the court, they are payments which were approved by the cestui, in advance, or ratified by the cestui, or the court after their making.

A beneficiary who, subsequently to a breach of trust, acquiesces in it, can not maintain a suit for relief against those who would otherwise have been liable. The acquiescence, in order to produce this effect, must take place with full information by the beneficiary of all the facts, and with full knowledge of his legal rights arising from these facts; in short, it must have all the requisites of an acquiescence heretofore described, to defeat the liability of a defaulting fiduciary.

If a cestui que *trust is a party to, or concurs in, or even assents to, a breach of trust by the trustee, he debars himself thereby of all claim for relief.*

A beneficiary who has consented to a breach of trust can not thereafter complain of such breach.

On exceptions. Case comes up on exceptions to the decree of a Justice of the Superior Court, sitting as the Supreme Court of Probate. Exceptions overruled. Case fully appears in the opinion.

Berman & Berman (Lewiston, Maine), for appellants.

Clifford & Clifford, for appellee.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. This case come up on exceptions to the decree of a Justice of the Superior Court, sitting as the Supreme Court of Pro-

bate. It concerns the allowance of two items in the probate account of Mary McLane Reardon, Trustee under the will of Susan O'Connell, for the benefit of John V. O'Connell. These items constitute charges for the board and expenses of Helen O'Connell, minor daughter of the beneficiary for the period of six years, and aggregate $1934.69.

By the will of Susan O'Connell, one-half of her estate, real and personal, was given to her daughter, Mary McLane Reardon. The remaining one-half was devised and bequeathed to this daughter as trustee in the following terms:

> "To properly care for and manage the same, collecting the rents, income and dividends therefrom, and paying all taxes, insurance premiums, repairs and other necessary expenses connected therewith and from the net income thereof pay monthly to my son, John V. O'Connell of said Lewiston, a sufficient amount to suitably and reasonably support and maintain, in health and sickness, said John V. O'Connell, individually, according to his degree and station in life, for and during the term of his natural life."

By the further provisions of the will, the daughter became entitled to the corpus of the trust estate upon the death of her brother, John V. O'Connell, if she survived him, and if not, it was willed to her legal heirs.

While there were no findings of fact in the decision of the court below, inspection of the record warrants the following statement of the situation as a basis for the decree.

Susan O'Connell died in 1925 and on August 25th of that year Mrs. Reardon (then McLane) was confirmed by the Probate Court as trustee under her will. The trust estate consisted of a one-half interest in real estate valued at $4000.00 and personal estate amounting to $2682.21. First account of the trustee was allowed October 12, 1926 showing payments to John V. O'Connell as beneficiary of $745.17.

On June 2, 1928 the wife of John V. O'Connell died, leaving him with a child, Helen, then eight years of age. O'Connell was at the time serving a sentence in the county jail. The trustee, who was his sister and the aunt of the minor child, attended the funeral of her

sister-in-law and it was arranged that the child should return with her to her home in Massachusetts. Some weeks later, after O'Connell was released from jail, he went to Massachusetts to visit his sister and daughter, remaining about a week. The trustee asserts that during this period an arrangment was entered into by which she should care for, educate and support the child, Helen, and be reimbursed from the income of the trust fund otherwise payable to O'Connell. The exceptants contend that there was no agreement for reimbursement and that the services and expenditures of the trustee on account of the child were gratuitous.

Albeit, the child stayed with her aunt for over six years. Aside from $15.00 which O'Connell collected on March 13, 1929 from a tenant of the real estate in which both were interested, there is no evidence that he ever thereafter asked for or received any net income from the trust fund, such income approximating $400.00 a year. The only exception is a debit to him of life insurance premiums paid of about $22.00 a year. He makes no claim that he paid his child's expenses, and admits that his only contributions to her welfare were small sums, chiefly spending money.

The child was returned to her father in August, 1934. A year later O'Connell made demand for the first time for an accounting by the trustee.

The exceptants, recognizing the rule that "findings of fact by a Justice presiding in the Supreme Court of Probate are conclusive and not to be reviewed by the Law Court if the record shows any evidence to support them." *First Auburn Trust Co.* v. *Baker*, 134 Me., 231, 184 A., 767; *Chaplin, Appellant*, 133 Me., 287, 177 A., 191 and cases cited, assert that there was no evidence of an agreement between the beneficiary and the trustee, of any acquiescence in or ratification of such arrangement by the beneficiary, cite alleged inconsistencies in the conduct of the trustee, and claim maladministration of the trust. These were controverted questions of fact and the court below made its finding which appears to be fully warranted by the record.

But the exceptants go further and say that it is the duty of the trustee to follow the directions in the will and there has been a failure to comply with its specific provisions.

The duty of a trustee is clearly set forth in 3 Pomeroy Eq. Jur., 4th Ed., Sec. 1062, as follows:

> "Under the general obligation of carrying the trust into execution, trustees and all fiduciary persons are bound, in the first place, to conform strictly to the directions of the trust. This is in fact the corner-stone upon which all other duties rest, the source from which all other duties take their origin. The trust itself, whatever it be, constitutes the charter of the trustee's powers and duties; from it he derives the rule of his conduct; it prescribes the extent and limits of his authority; it furnishes the measure of his obligations. If the trust is express, created by deed or will, then the provisions of the instrument must be followed and obeyed. If the fiduciary relation is established by law and regulated by settled legal rules, then these legal rules must constantly guide and restrain the conduct of the one who occupies the relation. In this manner the acts, powers, duties, and liabilities of executors, administrators, guardians, and corporation directors are governed by a fixed system of legal rules which constitute their instrument or declaration of trust. A trustee can use the property only for the purposes contemplated in the trust, and must conform to the provisions of the trust in their true spirit, intent, and meaning, and not merely in their letter. If, therefore, through non-feasance, he omits to carry the trust into execution, or through mis-feasance he disobeys the directions of the trust, he renders himself in some manner liable to the beneficiary whose rights have been thus violated."

In behalf of the trustee, it is contended that, in the present case, if the trustee has disobeyed the explicit and literal directions of the will, it has been at the instance, by the arrangement and agreement, and with the acquiescence and ratification of the beneficiary himself and in recognition of the legal obligation resting upon him to support his own minor child.

Under such circumstances, the trustee invokes the rule stated in 4 Bogert on Trusts, Sec. 941, pp. 2708–2709:

> "If a beneficiary, of full age and sound mind, acting with full knowledge of the facts of the case and of his rights, and

not under the influence of misrepresentation, concealment, or other wrongful conduct on the part of the trustee or another, consents that the trustee or a third person may perform an act or refrain from performing an act, equity will not permit the beneficiary to allege thereafter that the conduct of the trustee or third person to which consent was given was a breach of trust, or amounted to participation in a breach."

"The rules for the administration of trusts, established by the trust instrument, statute, and court rules, are solely for the benefit of the cestui. If he voluntarily withdraws from their protection, when fully competent, he ought to be permitted to do so. There is nothing against public policy in giving validation to his consent. He cannot come into equity and complain of an act which he has expressly sanctioned without violating the 'clean hands' doctrine of chancery. The trustee or the third person, or both, have by hypothesis acted on the consent of the cestui. It would be extremely unfair to allow him thereafter to contend that the act which he impliedly said would be rightful was in fact wrongful. He would be entrapping the opposing party."

And of similar import in Sec. 971, p. 2831:

"Payments made by a trustee will also be credited to him on his accounting, if, while not made in the execution of powers given him by the settlor, a statute, or the court, they are payments which were approved by the cestuis in advance, or ratified by the cestuis, or the court after their making."

With close relation to the instant case, we find the following by the author first quoted, Pomeroy Eq. Jur., 4th Ed., Vol. 3, Sec. 1083:

"A beneficiary who, subsequently to a breach of trust, acquiesces in it, cannot maintain a suit for relief against those who would otherwise have been liable. The acquiescence, in order to produce this effect, must take place with full information by the beneficiary of all the facts, and with full knowledge of his legal rights arising from these facts; in short, it must have all the requisites of an acquiescence heretofore described,

to defeat the liability of a defaulting fiduciary. Although in general, lapse of time is not a defense to the beneficiary's right of action, yet a great delay after knowledge of the breach of trust may be a bar. If a cestui que trust is a party to, or concurs in, or even assents to, a breach of trust by the trustee, he debars himself thereby of all claim for relief."

To the same effect, see Restatement, Trusts, Sec. 216.

The fundamental rules as to the duties and obligations of trustees, as hereinbefore cited, have been adopted and approved by our own Court.

In *Murphy* v. *Delano*, 95 Me., 229, 49 A., 1053, the court quoted in substance the rule as given in Pomeroy, Sec. 1062. In that case a creditor undertook to reach and apply to his debt the income of a trust fund which was in the nature of a spendthrift trust, and it was noted by the court that in the will there under consideration, nothing was secured to the beneficiary as a matter of right which could be reached by a creditor's bill.

In the present case the beneficiary was entitled of right to a sum (limited by the amount of the net income) sufficient to suitably and reasonably support and maintain him, in health and sickness, according to his degree and station in life. The sum of all the charges allowed in the trustee's probate account, does not exceed the net income.

In *Jordan* v. *Trust Estate*, 111 Me., 124, 88 A., 390, the trustee invested funds in an unproductive farm and depended upon an agreement or request of the beneficiary and his wife that the investment should be continued. To this the Court replied:

"Harry E. Jordan was under guardianship, and in law incompetent to manage his own estate, and testimony of how he desired the trust estate managed was inadmissible to excuse the trustee for the non-performance of the clear and unmistakable intent of the testator, as expressed in the clause of the will creating the trust."

In this case O'Connell was *sui juris*, competent to contract, and ostensibly at least, actuated by the worthy motive of providing a good home for his motherless child.

The Court in *Roberts* v. *Stevens*, 84 Me., 325, 24 A., 873, con-

struing the particular will under consideration found an expressed intention to protect the cestui from his creditors, and to prohibit him from transfer or assignment by anticipation. Even under such circumstances, the Court pointed out that after payment to the beneficiary:

> "It was no longer a legacy or an annuity or any part thereof. Its identity was gone. For whatever purpose, or to whomsoever the beneficiary might upon receiving it thereafter dispose of it, his act could in no wise be deemed in contravention or an evasion of the injunction."

Here the corpus of the trust estate amounted to approximately $6800.00. It can not be reasonably argued that the income on such sum would be more than sufficient for the designated purpose. The trustee had no discretion. She must account to the beneficiary for it. Upon payment he could use it as he pleased. He could not be compelled to apply it to his own support. He had a right to earn his own living otherwise. The justice below, by necessary inference, found that he appropriated it to the support of his child in performance of a parental obligation. After recognizing the propriety of his action for more than six years, can he now, being the only person in interest, be allowed to reclaim to his own use the money spent by his sanction and impose upon his sister the burden of the support of his child for that length of time? Equitable principles estop him.

In none of the Maine cases cited *supra* was there room or occasion for applying the doctrine of equitable estoppel. In defining its purpose Whitehouse, J. in *Martin* v. *Maine Central Railroad*, 83 Me., 100 at 104, 21 A., 740, at page 741, said:

> "Legal estoppels exclude evidence of the truth and the equity of the particular case to support a strict rule of law on grounds of public policy. Equitable estoppels are admitted on exactly the opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. *Horn* v. *Cole*, 51 N. H. 287. Though preeminently a creature

of equity, the doctrine has been incorporated into the law, and there is now an increasing tendency to apply it in the decision of legal controversies in courts of law. *Kirk* v. *Hamilton*, 102 U. S. 68. It is no longer regarded as merely a technical rule of evidence, but a part of substantive law which regulates rights and duties."

Having in mind the literal instruction of the will to pay it over to the beneficiary individually, and assuming the use made of the income of the trust fund was a technical breach of its requirements, the Massachusetts Court has put the matter in a nutshell thus:

"A beneficiary who has consented to a breach of trust cannot thereafter complain of such breach." *Lannin* v. *Buckley*, 256 Mass., 78, 152 N. E., 71, citing *Pope* v. *Farnsworth*, 146 Mass., 339, 344, 16 N. E., 262; *Preble* v. *Greenleaf*, 180 Mass., 79, 61 N. E., 808; *Richards* v. *Keyes*, 195 Mass., 184, 80 N. E., 812.

We find no prejudicial error in the decree of the Supreme Court of Probate upon the points raised. Modification as to allowance of costs may be made in the discretion of the court below.

Exceptions overruled.

KERMIT S. HAINES

vs.

CUMBERLAND COUNTY POWER AND LIGHT COMPANY.

LORINE C. HAINES

vs.

CUMBERLAND COUNTY POWER AND LIGHT COMPANY.

Cumberland. Opinion, September 15, 1938.

NEGLIGENCE.

The mere fact that the step of an electric car was wet and slippery when the plaintiff alighted did not prove that the defendant was negligent or that the car was defective, without further evidence tending to show the extent and cause of the condition and the length of time it had existed.

On motions for new trials. Two actions on the case to recover for personal injuries and medical expenses. Jury verdicts for plaintiffs. Defendant filed general motions for new trials. Verdicts set aside, new trials granted. Cases fully appear in the opinion.

Frank P. Preti, for plaintiffs.

Verrill, Hale, Dana & Walker, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

BARNES, J. Two cases were tried together, and so argued on appeal. Plaintiffs were husband and wife.

The suits were brought to recover damages for alleged injuries to the wife, and for reimbursement of financial loss to the husband.

The operator of defendant's electric car brought it to a stop at Woodfords Corner, and stood in the vestibule, observing an elderly lady, Mrs. MacPheters, Mrs. Haines, her daughter, then about four years old, and Miss Haines coming forward in that order to alight.

He testified that he remarked about the slippery condition of the road, and took hold of Mrs. MacPheters' arm as she took the single step before reaching the roadway; that Mrs. Haines stepped down next and as she turned partially around, reaching for her child, her feet went out from under her and she fell on the roadway, striking Mrs. MacPheters and bringing her down also.

In her declaration, Mrs. Haines alleges that "as she stepped down from the platform of the electric car to a step attached to it in order to reach the ground, her foot which came in contact with the step, suddenly slid out from underneath her, causing her to fall with great force and violence on her back, in the street, at the same time striking the upper part of her back against the car step, causing her severe physical injuries"; with usual allegations of negligence on the part of defendant, and due care on her part.

The time of the stop at the corner was shortly after 4 P.M. on February 11, 1935.

The day was clear, the streets covered with ice; no snow had fallen for two days.

The temperature had ranged from +36 degrees at 1 P.M. to +26 degrees at 4 o'clock.

The surface of the ice on roadways is described as "slushy" at the time of plaintiff's fall, and the road ice, smoothed by automobile wheels, extended to and under the running board of the electric car.

The car was manned by but one operator, with entrance and exit at the front, the step, about ten inches wide, turning to horizontal position automatically as the door was opened, and returned to vertical position, upper surface parallel with the side of the car, as the door was shut.

From all the testimony, negligence of defendant, which must be proved, can only be found, if the upper surface of the step as the passenger alighted, was dangerously icy, as the result of the exercise of less then due care on the part of defendant's agent, the operator of the car.

Mrs. MacPheters testified that she didn't see any ice on the car step, Mrs. Haines that she did not look at the step; while the operator of the car testified that he observed the condition of the step as he assisted Mrs. MacPheters to alight, "that it was in perfect condition. There was no accumulation of any kind on it," and Miss Haines testified that the step "was kind of a slushy ice. Looked as if it was freezing."

The sole issue in the case (for the jury must have decided that plaintiff slipped and fell before she had stepped on the icy roadway), was whether the defendant, by its employee, the operator of its car, negligently "allowed and permitted the said car step to become icy and slippery, so as to be dangerous and unsafe" for use of passengers.

It was perhaps impossible for the jury to reconcile the testimony so as to bring to agreement the statements on their face at variance.

The operator testified that he looked at the step while helping Mrs. MacPheters down, and that it was not slippery.

Miss Bruce, a disinterested witness who alighted at the next stop testified that she did not see any snow, ice or material of that sort

or slush on the car step; that she did not slip. In her cross-examination we find the following:

"Q. Miss Bruce, did you make any special attempt to observe the condition of the step after you got off?
A. Well, I always look when I get off like that. . . .
Q. As far as you know, there might have been some ice or frozen material on it and you not notice it?
A. I think I would have noticed it.
Q. It could have been there without your noticing?
A. I think I would have slipped too."

Mrs. MacPheters and the plaintiff, Mrs. Haines, testified that they did not look at the step.

Miss Haines, young sister-in-law of plaintiff, testified that she followed plaintiff in alighting; that she looked at the step. It was kind of slushy ice. Looked as if it was freezing.

Mrs. Haines testified that she did not hear the operator say anything to Mrs. MacPheters about being careful because it was slippery there. Mrs. MacPheters said she heard the warning, and the sister-in-law; that she heard it. But the jury evidently absolved the plaintiff from any negligence in not looking at the step.

That she was not guilty of negligence, the jury decided.

But, for the purposes of the trial then in their hands, they decided the defendant guilty of negligence.

On this point this Court in *Davis* v. *Waterville, Fairfield & Oakland Railway*, 117 Me., 32, 102 A., 374, said:

> "We think the true rule as to the duty of the carrier under such conditions is this: Assuming that the steps of the car are in proper condition when it begins a specific journey, the railroad company should not be held responsible, under ordinary circumstances, for the existence of snow or ice upon the steps accumulating through natural causes, during the journey, until it has had a reasonably sufficient time and opportunity, consistently with its duty to transport its passengers, to remove such accumulations. To require the immediate and continuous removal of all snow from the steps . . . would be impracticable."

Since the date of the opinion above quoted in part, in *Labrie* v. *Donham*, 243 Mass., 584, 138 N. E., 3, a case in many particulars like the case in hand, that court says, "In the case at bar the mere fact that the step was wet and slippery when the plaintiff alighted, as testified to by some of the witnesses, without further evidence tending to show the extent and cause of this condition and the length of time it had existed, did not prove that the defendant was negligent or that the car was defective."

The jury no doubt listened to the recital of pain and limited physical ability on the part of plaintiff wife, and attributed her present incapacity and possible future suffering solely to the fall at the crossing, forgetting that in November, 1933, she submitted to major surgery, curettage, repair of the cervix, appendectomy, a subtotal hysterectomy, including both tubes and ovaries; that she developed adhesions which caused intestinal obstruction and was operated on, one year before the accident to release the adhesions.

Faced with such recital, in despite of all testimony that, immediately after the accident she could have been cured in three or four months' time, at an expense of from $300 to $400, they awarded to her damages for pain and suffering in the amount of $2500; and to the husband their verdict gives as expense to him in attempting to repair what damage the railroad company had caused the sum of $1000, while such expense is by testimony and stipulation fixed at $125.

It seems evident that the jury were swayed by other than the weight of factual testimony, and that they erred in their conclusions.

In each case the entry must be

Verdicts set aside,
new trials granted.

ALICE WHITE *vs.* HAROLD M. SHALIT.

Cumberland. Opinion, October 8, 1938.

DIVORCE. CHILDREN.

Touching divorce, and rights relating to infant children of divorced parents, the statute confers authority, entirely.

An amendment to Sec. 11, *Chap.* 73, *R. S.* 1930, *P. L.* 1937, *Chap.* 7, *allowing the revisal of alimony decrees, is not retroactive.*

Allowances to the wife for herself and allowances to her for the support of her children are usually included in one sum.

The Maine statute treats alimony as a provision for the maintenance of the wife, and not necessarily for the support of such children as may be confided to her care and custody.

Means for prosecution or defense should be granted the wife, if she is otherwise entitled, and has not sufficient means of her own.

Sustenance allowances may be fixed in instalments, or for a specific amount.

There may be, from time to time, concerning children, variance of the decree, "as circumstances require."

Exercise of delegated power and discharge of conjoined duty are not restricted to any particular period within the minority of the children, nor is especial retention of the branch of the case, while proper practice, prerequisite to revising the decree. The statute preserves jurisdiction beyond the ability of the parties to exclude, or of the court to deprive itself.

"That which is implied in the statute is as much a part of it as that which is expressed." The court retains seizin of the divorce suit. The decree is a conditional one; prerogative to enter and to vary it is devolved in the same terms.

There can be no final judgment as to infant children, in a divorce case. Minor children of divorced parents are wards of the court. Theirs are new legal statuses. Taking a child out of the state does not preclude the court.

There may, when conditions justify it, be modification of the decree. Due attention may be given to agreements between the parties, but control of the court is not abrogated.

Although the issues on a petition to alter a custody and support decree are joined by the parties to the original libel, finding and judgment will, primarily, be directed to the best interests and essential good of the incapacitated parties, that is to say, the minor children.

In case of a conflict of laws, the law of the domicile regulates the status of the person.

A decree, awarding custody of children to the mother, may require the father to assist her in supporting his offspring.

On report on agreed statement of facts. A divorce was granted the petitioner on May 15, 1928, in the Superior Court, within and for the County of Cumberland. Custody of minor child and a single sum, in the stead of alimony, and inclusive of future support of the child, was decreed the petitioner. Petitioner seeks to amend decree respecting support of child. Agreeably to stipulation in the report, the case is remanded, for hearing and decision. Ordered accordingly. Case fully appears in the opinion.

Brann & Isaacson,
Charles A. Pomeroy, for petitioner.
Jacob H. Berman,
Edward J. Berman, for respondent.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. A divorce from the bonds of matrimony was, on May 15, 1928, in the Superior Court, within and for the County of Cumberland, granted the now petitioner, on the ground of utter desertion. She was given custody of the minor son, then three years of age.

A single sum, in the stead of alimony, and inclusive of future support of the child, was decreed. The ultimate and decisive point is whether the child's custodian had, at the June term, 1938, a right to petition the court that dissolved the marriage, to reconsider its decree, and, in respect to support money for the child, make, in the exercise of sound judicial discretion, modification or alteration, if proof should establish good cause.

Touching divorce, and rights relating to infant children of di-

vorced parents, the statute confers authority, entirely. *Henderson* v. *Henderson*, 64 Me., 419; *Stewart* v. *Stewart*, 78 Me., 548, 551, 7 A., 473. Statutory power and jurisdiction was, with regard to the instant case, both at the time of the divorce decree and the filing of the later petition, essentially the same. R. S. 1916, Chap. 65, Sec. 2, *et seq.*; R. S. 1930, Chap. 73, Sec. 2, *et seq.* An amendment to Section 11, passed subsequent to the original decree, P. L. 1937, Chapter 7, allowing the revisal of alimony decrees, is not retroactive. *Sherburne* v. *Sherburne*, 6 Me., 210; *Fidelity & Deposit Company, Appellant*, 103 Me., 382, 69 A., 616. The right to divorce has been in the Superior Court in Cumberland since 1911. P. L. 1911, Chap. 196; see, too, R. S., Chap. 73, Sec. 2, of citation before.

The divorce statute provides:

> "Sec. 14. The court making a decree of nullity, or of divorce, or any justice thereof in vacation, may also decree concerning the care, custody, and support of the minor children of the parties and with which parents any of them shall live, or ... alter its decree from time to time as circumstances require;..."

The decree, so far as a recital of its phrase seems germane, reads as follows:

> "Custody of minor child, Lewis Bernard, is given to the libellant, the libellee to be permitted to visit or see the child on reasonable occasions and for reasonable times and at reasonable places. The libellee is ordered to pay to said libellant in lieu of alimony and support of minor child the sum of Fifteen Thousand Dollars. The libellant is to release all right she may have in the realty of the libellee upon the payment to her of said sum. Right is granted to the libellant to resume her maiden name of Alice Hortense White."

"Allowances to the wife for herself and allowances to her for the support of her children are usually included in one sum." *Hall* v. *Green*, 87 Me., 122, 124, 32 A., 796.

The parties are agreed: that the money the decree mentions was fully paid; that all of it has been expended; that petitioner is now without funds, and unable properly to care for her son; and that since the divorce both mother and child have been, and are, of domicile in Massachusetts.

The agreement of facts, which is treated as evidence, warrants fair inference that the change of home was made by her reasonably and in good faith.

The Maine statute treats alimony as a provision for the maintenance of the wife, and not necessarily for the support of such children as may be confided to her care and custody.

First, "pending a libel," the wife may be provided with means to defend or prosecute the divorce suit, and for her separate existence. R. S., Chap. 73, Sec. 6. The section deals also with the care and custody of minor children, but not, expressly at least, with their subsistence.

Means for prosecution or defense, it may be noticed in passing, should be granted the wife, if she is otherwise entitled, and has not sufficient means of her own. *Collins* v. *Collins*, 80 N. Y., 1. The cited case lays down that when the wife has such means, temporary alimony is, as a settled principle of equity, not allowable. *Collins* v. *Collins*, supra.

Section 9, to recur to the statute, is the source, limited to divorcement for the fault of the husband, for awarding permanent alimony. In lieu, award may be in a gross sum. (An amendment to this section, P. L. 1937, Chap. 155, is here without bearing.)

Section 14 invests authority where, after hearing, conclusion is that there should be a divorce, to determine, incidentally, as to the care, custody and support of the minor children of the parties.

Sustenance allowances may be fixed in instalments, or for a specific amount. *Call* v. *Call*, 65 Me., 407.

And there may be, from time to time, concerning children, variance of the decree, "as circumstances require." Section 14. *Stratton* v. *Stratton*, 73 Me., 481, so recognizes.

The language of the statute is comprehensive.

Exercise of delegated power and discharge of conjoined duty are not restricted to any particular period within the minority of the children, nor is especial retention of this branch of the case, while proper practice, prerequisite to revising the decree. The statute preserves jurisdiction beyond the ability of the parties to exclude, or of the court to deprive itself. *Hayes* v. *Hayes*, (Mo. App.,) 75 S. W. (2nd), 614; *Walters* v. *Walters*, (Miss.,) 177 So., 507; *Wilson* v. *Caswell*, 272 Mass., 297, 172 N. E., 251.

"That which is implied in the statute is as much a part of it as that which is expressed." 59 C. J., 973. The court retains seizin of the divorce suit. *Prescott* v. *Prescott*, 62 Me., 428, 430. The decree is a conditional one; prerogative to enter and to vary it is devolved in the same terms. *Harvey* v. *Lane*, 66 Me., 536, 538.

There can be no final judgment as to infant children, in a divorce case. *Keith* v. *Keith*, 270 Ky., 655, 110 S. W. (2nd), 424. Minor children of divorced parents are wards of the court. *Greenberg* v. *Greenberg*, 99 N. J. E., 461, 133 A., 768. Theirs are new legal statuses. *Stetson* v. *Stetson*, 80 Me., 483, 15 A., 60. Taking a child out of the state does not preclude the court. *Hersey* v. *Hersey*, 271 Mass., 545, 171 N. E., 815; *Stetson* v. *Stetson*, supra.

The State, true enough, has sway over its own inhabitants, only. *Gregory* v. *Gregory*, 78 Me,. 187, 189, 3 A., 280. But, the child is not removed from the jurisdiction of the court. "That has," as Judge Danforth observes, "already attached." *Stetson* v. *Stetson*, supra.

There may, when conditions justify it, be modification of the decree. *Luques* v. *Luques*, 127 Me., 356, 361, 143 A., 263; *Oakes* v. *Oakes*, 266 Mass., 150, 165 N. E., 17. Due attention may be given to agreements between the parties, but control of the court is not abrogated. *Oakes* v. *Oakes*, supra; *Burnett* v. *Paine*, 62 Me., 122.

Although the issues on a petition to alter a custody and support decree are joined by the parties to the original libel, finding and judgment will, primarily, be directed to the best interests and essential good of the incapacitated parties, that is to say, the minor children. *Stetson* v. *Stetson*, supra.

Massachusetts has a statute in these words:

> "Section 29. If, after a divorce has been decreed in another jurisdiction, minor children of the marriage are inhabitants of or residents in this commonwealth, the superior or probate court for the county in which said minors or any of them are inhabitants or residents, upon petition of either parent or of a next friend in behalf of the children, after notice to both parents, shall have the same power to make decrees relative to their care, custody, education and maintenance, and to revise and alter such decrees or make new decrees, as if the divorce

had been decreed in this commonwealth." G. L., Chap. 208, Sec. 29.

In case of a conflict of laws, the law of the domicile regulates the status of the person. *Gregory* v. *Gregory*, supra.

But, nothing on the record goes to show that either this petitioner, or the respondent, had invoked the provisions of that statute.

One decree only, that of the Superior Court of the State of Maine, which has jurisdiction of all the parties, affects the subject under consideration.

It is too plain for discussion that the statute of Massachusetts did not supersede that of Maine; whether a decree under the Massachusetts statute would supersede the Maine decree, it is not necessary to inquire.

Contention that the emancipation of the child is effected, is not of moment. Divorce is not an act of the parties; it is an act of the law. A decree, awarding custody of children to the mother, may require the father to assist her in supporting his offspring. *Hall* v. *Green*, supra.

The situation is this: The still enduring decree is revisable in the court where it was entered. That decree, as regards the minor child, is not changeless. The court can give it new form. If, in equitable and considered judgment, an occasion has arisen where additional money should be paid for the support of the boy, the court can amend the decree.

Agreeably to stipulation in the report, the case is remanded, for hearing and decision.

Ordered accordingly.

MICHAEL J. V. MCDONOUGH, ALIAS
MICHAEL V. MCDONOUGH, EXECUTOR
UNDER THE WILL OF ANNIE F. MCDONOUGH

vs.

PORTLAND SAVINGS BANK AND AGATHA M. CAREY.

Cumberland. Opinion, October 10, 1938.

GIFTS CAUSA MORTIS.

Gifts causa mortis *"are not to be favored, as they conflict with the general policy of the law relating to the disposition of the estates of deceased persons."*

As in gifts inter vivos, *so in gifts* causa mortis, *it must appear that the donor intends to and does in fact surrender absolutely all present and future dominion and control over the property, "subject in case of a gift* causa mortis *to revocation during lifetime and conditioned upon the death of the donor."*

In gifts inter vivos *and gifts* causa mortis *delivery to the donee is not enough unless accompanied with an intent to surrender all present and future dominion over the property.*

In order to make a valid gift causa mortis *there must be a clear and intelligent manifestation of an intention to make a present gift and the required intention must be definite and certain. The delivery necessary to create such a gift must be such that the donor parts with all present control and dominion over it.*

In order to be effectual a gift must be fully executed, for the reason that, there being no consideration therefor, no action will lie to enforce it. If anything remains to be done the transaction is a mere executory agreement to give, and the title does not pass.

Intention to give culminates in a completed gift when title passes on delivery. Before but not after an unconditional delivery, the subject matter of the gift is wholly within the control of the donor.

The finding of fact by the justice below must stand unless it is clearly wrong.

The burden of proving a gift causa mortis *rests on the one seeking to establish it, and to perform that burden she must produce evidence, clear and convincing.*

The mere opening of a joint account, each having an equal right to draw, does

not, in and of itself, establish a gift. Where the deposit by a person is in the name of himself and another, the presumption is that it was done for the purposes of convenience only, and this presumption is strengthened by the illness or infirmity of the depositor.

On appeal. Executor of estate of Annie F. McDonough, in equity, seeks to obtain, as an asset of her estate, a deposit in the Portland Savings Bank. Deposit in the joint names of deceased and one Agatha M. Carey. Appeal dismissed. Decree below affirmed. Case fully appears in the opinion.

Arthur D. Welch, for plaintiff.

Gould & Shackley,

Francis W. Sullivan, for defendants.

SITTING: DUNN, C. J., BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. The complainant, executor of the last will and testament of Annie F. McDonough, late of Portland, claims and seeks to obtain as an asset of her estate a deposit in the Portland Savings Bank.

The original account was opened by Miss McDonough on September 24, 1934, when she deposited $142.65. To this she added from time to time so that on April 23, 1936 it amounted to $1900.31. It is admitted that on that day it was her sole property. For some days prior to April 23, 1936, she had been ill and it became necessary for her to be taken to the Queen's Hospital. She was living in her brother-in-law's home, managed by his daughter, Agatha M. Carey, Miss McDonough's niece. Miss Carey told her aunt that the doctor said that she should go to the hospital in an ambulance rather than by ordinary conveyance because the latter mode might bring fatal results. Miss McDonough said: "If I am that sick, you had better take that bank book that is in the trunk there and have your name put on it." The niece got and took the book to her aunt, who immediately said (according to the testimony of the niece only, testifying without objection): "Take this and if anything happens to me divide that between yourself and Helen — Dorothy won't need it and Frances — doesn't deserve it." Later that day she took the book to the bank and informed an official of what her aunt had said, whereupon she was given an order to be

signed by Miss McDonough as authority for transfer of the account. This she gave to Miss McDonough that day in the hospital but it was not signed until morning. Omitting the salutation, it read:

> "I hereby authorize and direct you to transfer my deposit in said Portland Savings Bank now represented by book of deposit and account No. 103009 to a new account in the names of Annie F. McDonough and Agatha M. Carey payable to either or to the survivor. The total amount due at any time on the said new account, or any part thereof, may be paid by the said Bank to either of the persons named whether the other be living or not; and the receipt or acquittance of the person so paid shall be a valid and sufficient discharge to the said Bank for any payment so made.
>
> Annie F. McDonough."

The niece returned the order to the bank immediately. Upon cancellation of the existing account, a new one was opened and a new book issued, entitled, "Portland Savings Bank, Portland, Maine in account with Annie F. McDonough & Agatha M. Carey payable to either or to the survivor." Miss McDonough died May 7, 1936 from coronary thrombosis.

The justice below sustained the bill, from whose decision Miss Carey appeals.

She claims title by gift *causa mortis*. Whether the alleged gift was made in contemplation and expectation of death need not now be determined, for the case may be disposed of on another ground.

Gifts *causa mortis* "are not to be favored, as they conflict with the general policy of the law relating to the disposition of the estates of deceased persons." *Parcher, Admr.* v. *Saco & Biddeford Savings Institution*, 78 Me., 470, 473, 7 A., 266; also see *Drew, Admr.* v. *Hagerty et al.*, 81 Me., 231, 243, 17 A., 63; *Farnsworth, Admr.* v. *Whiting et als.*, 106 Me., 430, 433, 76 A., 909; *Hatch* v. *Atkinson et al.*, 56 Me., 324, 326.

As in gifts *inter vivos*, so in gifts *causa mortis*, it must appear that the donor intends to and does in fact surrender absolutely all present and future dominion and control over the property, "subject in case of a gift *causa mortis* to revocation during lifetime and

conditioned upon the death of the donor." *Farnsworth* v. *Whiting*, supra, 430, 433; *Maine Savings Bank, In Equity* v. *Welch et al.*, 121 Me., 49, 53, 115 A., 545, 546; *Dole* v. *Lincoln*, 31 Me., 422, 429.

This Court (truly, of gifts *inter vivos* but equally applicable to gifts *causa mortis*) has recently said:

> "Delivery to the donee is not enough unless accompanied with an intent to surrender all present and future dominion over the property. . . . When one's intention is to retain the right to use so much of a bank account as he desires during his life, and that the balance upon his decease shall become the property of the donee (although there may be a delivery of the bank book to the donee), no valid gift *inter vivos* is made. Such is in the nature of a testamentary disposition of property and is legally inoperative because contrary to the Statute of Wills." *Rose, Admx.* v. *Osborne, Jr.*, 133 Me., 497, 501, 180 A., 315, 317.

Also see *Maine Savings Bank, In Equity* v. *Welch*, supra, page 53, 115 A., 545; *Howard, Admr., In Equity* v. *Dingley et als.*, 122 Me., 5, 10, 118 A., 592.

In order to make a valid gift *causa mortis* there must be a clear and intelligent manifestation of an intention to make a present gift and the required intention must be definite and certain. 28 C. J., Sec. 99, pages 687, 688; 12 R. C. L., Sec. 33, page 957.

The delivery necessary to create such a gift "must be such that the donor parts with all present control and dominion over it." 12 R. C. L., Sec. 34, page 959.

It is stated that "in order to be effectual a gift must be fully executed, for the reason that, there being no consideration therefor, no action will lie to enforce it. If anything remains to be done the transaction is a mere executory agreement to give, and the title does not pass." 28 C. J., Sec. 20, page 629.

Title passes upon delivery, for then it is the intention to give culminates in a completed gift. Before but not after an unconditional delivery, the subject matter of the gift is wholly within the control of the donor.

Also, as said in *Drew, Admr.* v. *Hagerty et al.*, 81 Me., 231, 242, 17 A., 63, 64:

> "It" (meaning delivery) "is a test of sincerity and distinguishes idle talk from serious purposes. And it makes fraud and perjury more difficult. Mere words are easily misrepresented."

Did Miss McDonough deliver the book to the niece with an intention to surrender all present and future control and dominion over the account it evidenced? This was a question of fact for determination in the first instance by the justice below. He found she did not. That finding must stand unless clearly wrong. *Young, In Equity* v. *Witham*, 75 Me., 536; *Sposedo, In Equity* v. *Merriman et als.*, 111 Me., 530, 538, 90 A., 387; *Goodale, In Equity* v. *Wilson et als.*, 134 Me., 358, 360, 186 A., 876.

The burden to prove the gift *causa mortis* rested on the niece. *Dunbar, Admr.* v. *Dunbar*, 80 Me., 152, 153, 13 A., 578; *Staples, Admr.* v. *Berry, Admr. et al.*, 110 Me., 32, 35, 85 A., 303.

To perform that burden it was her duty to produce evidence, clear and convincing. *Staples* v. *Berry*, supra, page 35, 85 A., 303; *Farnsworth, Admx.* v. *Whiting et als.*, supra, pages 434, 435, 76 A., 909.

The record sufficiently supports the finding of the single justice. The niece herself testified that she understood her aunt's name was to remain on the book as long as she lived, that at no time did she ask to have it taken off, and that had her aunt asked her to take her name off that she would have done so. Furthermore, she confirmed testimony that she had previously given in the Probate Court that if her aunt had wanted some money on the account before she died, she could have drawn it. When on cross-examination she was asked if she claimed that this was a gift to her to take place then, she answered, "No."

When Miss McDonough signed the order to the bank on April 24th, giving it authority to make the transfer, she had kept it over night and in reading it must have noted its express provision, permitting the bank to pay the new account *either* to her or her niece. If, when she let her take the book to have her name put on it, she had relinquished all rights to the account therein (except that of complete revocation inherent to a gift *causa mortis*), it would be

strange indeed that on the following day she would have signed an order whereby she could withdraw all or part of it.

Analyzed, construed and consolidated, what the aunt said to her niece on April 23rd was this in effect: Take this book, have your name put on it with mine, keep it and if anything happens to me divide the account between yourself and your sister. *Then* there was no expectation that a new account would be opened and a new book be issued. No one contends that the aunt's name was to be stricken off and that of the niece substituted. The name of the niece was not put on the first book as directed.

Another failure of compliance appears, for not only did she not have her name put on the original book but, as admitted by her attorney, she "signed a receipt in full for the entire deposit," meaning the original account, and then, it being redeposited, took out the new book in both of their names.

The delivery of the bank book to her did not constitute a completed gift. By that delivery it was not intended that title should then pass and vest in her. She was given possession of the book so that her name could be placed on it as a joint owner with her aunt, each to have an equal right of control and dominion over it. This was not done. Instead the original account was cancelled and the new account opened. This suit is to impress a trust on the new account, as to which the aunt over her own signature, with the knowledge and consent of the niece, expressly reserved the right of withdrawal.

Miss Carey could get title (not purchasing it) in one of three ways, viz., by gift, trust, or bequest. See Annotation 1917C, L. R. A. 551. As there stated, "unless the survivor can show title in one of these ways his claim must fail." She does not claim to have obtained it, either by trust or bequest, but only by gift. For reasons stated, she did not get title by gift either *inter vivos* or *causa mortis*.

Furthermore, she can not hold it under principles of joint tenancy, although Miss McDonough may have intended to create such a tenancy, for the four necessary elements of unity as to time, title, interest and possession are not present. *Staples, Admr.* v. *Berry, Admr. et al.*, supra, pages 32, 35, 36, 37, 85 A., 303; *Garland, Appellant from Decree of Judge of Probate*, 126 Me., 84, 136 A., 459; *Portland National Bank* v. *Brooks et al.*, 126 Me., 251, 137

A., 641; *Heard, In Equity* v. *Gurdy, Admr.*, 127 Me., 480, 144 A., 399; *Rose, Admx.* v. *Osborne, Jr.*, supra, 497, 509, 180 A., 315.

We are aware that a court of high repute has adopted "the contract theory," so called, which, if applied here, might permit the niece to hold this account. *Goldston* v. *Randolph et al.*, 199 N. E., 896 (Mass.), and cases cited therein. But our Court does not recognize this doctrine.

In *Garland, Appellant from Decree of Judge of Probate*, supra, our Court said on page 96:

> "But we can not assent to the doctrine, that where the party to whom the fund belonged retains full control over it during his lifetime, and no actual gift *inter vivos* either of the fund or the chose in action is shown, though made payable to him or another or to the survivor, any title passes to the survivor by virtue of a contract between the bank and the owner and the survivor. An intended gift can no more pass after death by contract than by a simple order to pay. If the donor retains control for his own uses during his lifetime there can be no gift *inter vivos*, and the theory of a *post mortem* transfer by contract is as clearly of the nature of a testamentary disposition as a gift to take effect after death without such contract."

It is claimed that *Curtis* v. *Portland Savings Bank*, 77 Me., 151, controls this case. We think not. An aunt, referring to her savings bank book that she had asked her niece to take out of her trunk, said: "Now keep this, and if anything happens to me, bury me decently and put a headstone over me, and anything that it is left is yours." The court found an intent to make an absolute gift *in presenti* and said that "the special qualification annexed to the gift" did not "defeat it. This was only coupling the gift with the trust that the donee should provide for the funeral of the donor."

There at the time of the alleged gift the name of the niece was already on the book. Here it was not. The fact of the addition of another name does not signify an intention to make a valid gift.

> "The mere opening of a joint account, each having an equal right to draw, does not, in and of itself, establish a gift. Indeed such an account might tend to show that a gift was not

intended. . . . Where the deposit by a person is in the name of himself and another, . . . the presumption is that it was done for the purposes of convenience only, and this presumption is strengthened by the illness or infirmity of the depositor." 28 C. J., Sec. 64, page 664.

In the Curtis case the niece at the time of the alleged gift already had the right to draw on the account and so when the donor said, "Now keep this, . . ." gave specific directions as to a certain use to be made with part of the funds, and then said, "and anything that is left is yours" (meaning after the expenses directed to be paid had been paid), the court could well say: ". . . The declaration above quoted, accompanied by the manual delivery of the deposit book, rendered unmistakable her intention. The delivery was sufficient."

In that case, the donor declared and limited any future use and benefit she might derive from the account in directing that the expenses of her burial and a headstone should be paid out of it. To accomplish that, she coupled the gift with a trust and the court held that that did not defeat a valid gift *causa mortis*. There the donor made a gift *in presenti* of the whole account, part outright and part in trust, and retained no right of control and dominion over either part. If the trust provisions had not been performed, they could have been enforced for the benefit of the cestui que trust as in any other legally established trust. It so happened the cestui que trust and the trustor were in fact the donor but nevertheless there was no retention of any right to dominate or control the deposit as donor. In the instant case there is present an element lacking in the Curtis case, viz., an intention to open a new joint account at the time of the making of the alleged gift.

On the record in the given case, the justice below could well find that the aunt never intended to surrender absolutely her right of control and dominion over either the first or second account but did intend that each should constitute a joint account (invalid as already stated), available either to her niece or herself, and that the balance remaining upon her own death should be divided equally between the niece and her sister. Thus is evidenced "not a gift *in presenti*, either *inter vivos* or *causa mortis*, but an attempted testa-

mentary disposition of her property after death," violative of the Statute of Wills. *Maine Savings Bank, In Equity* v. *Welch et als.*, supra, page 52, 115 A., 546.

The entry must be,

Appeal dismissed.
Decree below affirmed.

HAVANA ELECTRIC RAILWAY CO.,

APPELLANT FROM DECREE OF JUDGE OF PROBATE,

IN RE ESTATE OF ROY H. NEELY.

Kennebec. Opinion, October 13, 1938.

EXECUTORS AND ADMINISTRATORS. PROBATE COURTS.

Contractual rights, obligations, mere choses in action, have no situs.

Relative to probate proceedings, the element of the amount of property may not, save for fraud, or defect evident on inspection of the original record, be the subject of collateral attack. The remedy for relief is on appeal.

Decrees of Probate Courts in matters of probate, within the authority conferred upon them by law, are, when not appealed from, conclusive. Such decrees are binding upon the common-law courts, and not reversible by writ of error or certiorari. Nor can they be set aside in equity, even for fraud.

The Probate Court has, after decreeing, and after time for appealing from the decree has passed, the power, upon petition, subsequently filed, notice, and hearing, to open and vacate a prior decree, clearly shown to be without foundation in law or fact and in derogation of legal right.

The Probate Court has jurisdiction as a Court of Equity in specified cases. Such court sits as a Court of Equity only in cases relative to the administration of estates, the execution of last wills, and the performance of trusts.

From that court, an appeal lies to the Supreme Court of Probate.

On exceptions. Case originated as a petition, filed by Havana Electric Railway Company, in the nature of a bill in equity, addressed to the Probate Court for the County of Kennebec to set aside the decree of that Court appointing Viola Neely as adminis-

tratrix of the estate of Roy H. Neely. Demurrer was filed to the bill by defendant and a decree sustaining the demurrer entered in said Probate Court. Petitioner appealed from decision to the Superior Court for the County of Kennebec, being the Supreme Court of Probate. The presiding Justice, at the April, 1938 Term, sustained decree of Probate Court. Exceptions taken by petitioner. Case dismissed. Case fully appears in the opinion.

McLean, Fogg & Southard, for appellant.

Gordon F. Gallert,

Harvey D. Eaton, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. This record manifests irregularity precluding consideration on the merits.

A court whose authority was not invoked, and to which the proceeding had not been transferred, nor could be, assumed to determine issues, and to decree. No exception raises the point; nevertheless, the existing condition should not be disregarded.

The Havana Electric Railway Company is a Maine corporation, having been organized in 1926, under the general incorporation laws of this State. The domicile of the corporation is Augusta, the shire town of the County of Kennebec; the principal manual business of the concern is carried on elsewhere.

On December 15, 1937, the company petitioned the probate court in Kennebec county to revoke the decree which, on August 23, 1937, that court entered in respect to granting administration on the estate of one Roy H. Neely, a person deceased, intestate.

Administration was on the ground that, although the decedent was not, on the day of the date of his death (October 3, 1930,) a resident of Maine, yet, he either left within the State, administrable estate of twenty dollars minimum value, or such was later found therein. R. S., Chap. 75, Sec. 9.

The administratrix appointed by the probate court accepted her trust, and entered upon the discharge of her duties.

In such capacity, she sued the railway company, alleging breach by it, since the death of her intestate, of the terms of a certain con-

tract, to which he had been party; the claim for damages was one hundred thousand dollars. The action is still pending in the Kennebec county superior court.

Contractual rights, obligations, mere choses in action, have no *situs*. *Pullen* v. *Hillman*, 84 Me., 129, 24 A., 795.

Relative to probate proceedings, the element of the amount of property may not, save for fraud, or defect evident on inspection of the original record, be the subject of collateral attack. R. S., Chap. 75, Sec. 16. See the analogous cases of *Record* v. *Howard*, 58 Me., 225, and *Spencer* v. *Bouchard*, 123 Me., 15, 121 A., 164. The remedy for relief is on appeal. R. S., hereinabove cited.

Decrees of probate courts in matters of probate, within the authority conferred upon them by law, are, when not appealed from, conclusive. *Waters* v. *Stickney*, 12 Allen, 1; *Snow* v. *Russell*, 93 Me., 362, 376, 45 A., 305.

Such decrees are binding upon the common-law courts, and not reversible by writ of error or certiorari. Nor can they be set aside in equity, even for fraud. *Waters* v. *Stickney*, supra.

But, the probate court has, after decreeing, and after the time for appealing from the decree has passed, the power, upon petition, subsequently filed, notice, and hearing, to open and vacate a prior decree, clearly shown to be without foundation in law or fact and in derogation of legal right. *Waters* v. *Stickney*, supra; *Merrill Trust Company, Appellant* v. *Hartford*, 104 Me, 566, 72 A., 745.

The administratress demurred to the petition for annulment of the administration decree.

To now, the probate court was the forum.

In demurring, "the defendant demurs to plaintiff's bill, and assigns":

* * * *

"Second, That plaintiff by its bill shows no cause nor ground for any relief in equity against the defendant."

Any further quotation from the pleading would be cumulative.

The probate judge, ostensibly in equity, his decree being so entitled, sustained the demurrer, and dismissed the bill.

Difficulty now is not with such conclusion; that seemingly has support in reported cases. *Saunders* v. *Weston*, 74 Me., 85; *Nash* v. *Benari*, 117 Me., 491, 105 A., 107.

The present condition arises from the fact that the decree was made on the equity side, rather than the probate side, of the judicial tribunal.

The probate court has jurisdiction as a court of equity in specified cases. R. S., Chap. 75, Sec. 2. Such court sits as a court of equity only in cases relative to the administration of estates, the execution of last wills, and the performance of trusts. R. S., *supra.*

From that court, an appeal lies to the Supreme Court of Probate. *Norris* v. *Moody*, 120 Me., 151, 113 A., 24.

The probate court petitioner made an appeal from dismissal of its petition, but the appeal was from the decree of a judge purporting to exercise equity jurisdiction.

In the appellate probate court, the appeal was dismissed, and the decree below affirmed.

A bill of exceptions was allowed.

The original petition, that for annulment, was addressed to the probate court. That court has not determined the issues.

There are, in virtue of legislation, two different courts: one a probate court, of full panoply; the other an equity court, of special and limited authorization, which can decide finally a question properly presented, subject, of course, to the right of appeal. The two courts have but a single judge. In other words, a judge in the probate court derives from the statute his power to hold the equity court.

The petition, as noticed before, was to the probate court; that court ordered notice; simply this and nothing else.

There never was a basis on which to rest an equity court decree.

Case dismissed.

SARAH H. GOULD *vs.* MAINE CENTRAL TRANSPORTATION COMPANY.

APPLETON GOULD *vs.* MAINE CENTRAL TRANSPORTATION COMPANY.

Penobscot. Opinion, October 24, 1938.

CARRIERS. NEGLIGENCE.

In dealing with question as to whether trial justice erred in directing verdicts for defendant, so far as the evidence is concerned, it must be viewed in the light most favorable to the plaintiffs.

Defendant, in its operation of its bus, while acting as a common carrier, owed the duty to a passenger, not as an insurer, but to exercise the highest degree of care compatible with the practical operation of the machine in which the conveyance was undertaken.

To render common carriers of passengers liable for an injury to passengers while under their charge, it is not necessary that they be guilty of gross or great negligence; it is enough if the accident was caused solely by any negligence on their part, however slight, if, by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained.

A carrier of passengers is not responsible for an injury caused by an unforeseen accident against which human care and foresight could not guard and which is not caused in any degree by acts of negligence.

It is not dangerous to have the windows of a bus open under prevailing weather conditions, unless peril or injury therefrom might have been reasonably anticipated under the circumstances. But whether such peril or injury might have been reasonably anticipated under the circumstances, is a question of fact dependent upon the particular circumstances of the given case.

While it is undoubtedly true that a passenger must take the risks incident to the mode of travel and the character of the means of conveyance which he adopts, such risks are only those which can not be avoided by the carrier by the use of the utmost degree of care and skill in the preparation and management of the means of conveyance.

Failure to submit to the fact-finding jury the questions whether the defendant exercised requisite care in the preparation and management of its bus, with reference to the open window and should have reasonably anticipated to result therefrom peril or injury to its passenger was reversible error.

On exceptions. Actions by Sarah H. Gould and husband, Appleton Gould, against Maine Central Transportation Company seeking damages for injuries received by wife when a passenger in a bus of defendant company. Directed verdicts for defendant. Cases come forward on exceptions by plaintiffs to admissibility of evidence and to direction of verdicts for defendant. Exceptions to directed verdicts sustained. Cases fully appear in the opinion.

Stern, Stern and Stern, for plaintiffs.

Edward S. Anthoine,

Charles P. Conners, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. These two cases, brought by husband and wife and growing out of an accident in which she was injured, come to us on like exceptions, the first three of which relate to the admissibility of evidence, while the fourth is taken to the direction of verdicts for the defendant. First we will consider the last exception; if that be sustained, it is decisive, for if without the evidence offered and rejected, the case should have been submitted to the jury, error of its exclusion need not be established by the exceptant.

Did the justice below err in his direction of verdicts for the defendant? In dealing with this question, so far as the evidence is concerned, it must be viewed in the light most favorable to the plaintiffs. *Searles* v. *Ross et al.*, 134 Me., 77, 81, 181 A., 820; *Goodwin* v. *Boston & Maine Railroad*, 134 Me., 282, 283, 186 A., 603.

The jury could have found that on June 13, 1936, Mrs. Gould purchased tickets for herself and some relatives for their transportation from Bangor to Newburyport by bus owned and operated by the defendant company; that these tickets had on them seat numbers; that the bus driver showed Mrs. Gould to her seat, which was the inside seat on the first row to the left of the aisle and facing the windshield; that immediately in front of her seat and to the left of the driver's windshield was an open window, with nothing whatsoever to protect her from any object coming through it, which the bus driver permitted to remain open while he drove at a

speed of about fifty (50) miles per hour; that while the bus was so proceeding near Gray, she felt something strike her in the eye "with such force that it felt like a cannon ball" and she screamed, "Stop the bus, stop the bus, something came in the window, and struck me in the eye!"; and that thereby she received serious injuries, the recovery of damages for which her action is brought, while that of her husband is to recover expenses and loss of consortium resulting from the accident.

It is not contended that it is definitely known just what hit her eye; it is admitted, however, that it was something from outside, but whether a small stone from the road or an insect from the air is only in the realm of conjecture. At the time of the accident, there was no passing vehicle; furthermore, a search through the bus conducted immediately after the accident disclosed no stone or other object claimed to have come through the window.

That the defendant in its operation of its bus was acting as a common carrier is conceded. It was chargeable with performance of the obligation attaching to common carriers of passengers. *Chaput* v. *Lussier*, 132 Me., 48, 165 A., 573. The duty owed Mrs. Gould was to carry her "not as an insurer, but in the exercise of the highest degree of care compatible with the practical operation of the machine in which the conveyance was undertaken." *Chaput* v. *Lussier*, supra, on page 52, 165 A., page 575, and cases there cited.

Other Maine cases dealing with the care requisite of observance are *Edwards* v. *Lord*, 49 Me., 279, in which this Court upheld an instruction by the presiding Justice that the defendant "was bound to use greater than ordinary care—such care as is used by very cautious persons; and if any reasonable skill and care on his part could have prevented the accident, the defendant was liable"; and *Knight* v. *Portland, Saco & Portsmouth R. R. Co.*, 56 Me., 234, approving instructions given in this language:

> "Common carriers of passengers are required to exercise the strictest care which is consistent with the reasonable performance of their contract of transportation.
>
> "While they are not bound to insure the absolute safety of their passengers, they are required to make use of such safeguards for the protection of their passengers as science and

art have devised, and as experience has proved to be efficacious in accomplishing their object.

* * *

"To render them liable for an injury to passengers while under their charge, it is not necessary that they be guilty of gross or great negligence; it is enough if the accident was caused solely by any negligence on their part, however slight, if, by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained."

As stated in American Jurisprudence, volume 10, section 1237, page 157:

"A carrier of passengers is not responsible for an injury caused by an unforeseen accident against which human care and foresight could not guard and which is not caused in any degree by acts of negligence."

Did the defendant violate its duty as a common carrier in allowing this window to remain open directly in front of Mrs. Gould and through which the object (whatever it was) came, it being conceded to have been a warm day in June when proper ventilation was necessary for the reasonable comfort of the occupants of the bus? Cited is *Bowling Green-Hopkinsville Bus Co.* v. *Edwards* (1933), 248 Ky., 684; 59 S. W. (2d), 584, where the plaintiff's eye was injured by a stone thrown through an open window by the wheels either of a passing truck or of the bus in which he was riding, while the bus was travelling over a road of loose gravel. There the court stated:

"The question is presented whether the casting of the rock was through actionable negligence; and that would seem to rest upon whether the throwing of the stone and an injury should have been reasonably anticipated or foreseen as a natural and probable consequence."

It held that if the rock came from the passing truck, "it was not dangerous to have had the windows of the bus open under the prevailing weather conditions, *unless peril or injury therefrom might have been reasonably anticipated under the circumstances.*" (Italics

ours.) But whether such peril or injury might have been "reasonably anticipated under the circumstances" is a question of fact dependent upon the particular circumstances of the given case.

In the instant case, conceding it was a hot day and proper ventilation was necessary, it should have been left for the jury to determine as a fact whether the defendant, in permitting this window to remain open, observed that degree of care with which the defendant as a common carrier was chargeable. Could it reasonably have anticipated peril to its passenger and likely injury to her from its failure to close the window in operating its bus at such a speed and creating thereby such a draft as likely to suck into the bus small objects, whether insects or otherwise, that might be in the air immediately in front of the open window? Employing the language of *Chaput* v. *Lussier*, supra, was it "in the exercise of the highest degree of care compatible with the practical operation of the machine in which the conveyance was undertaken?" We can not say that as a matter of law there was observance of such care. It was a factual question for the jury's determination.

We are not unmindful of the decision of the Massachusetts court in *Shine* v. *New York, New Haven & Hartford Railroad Company*, 236 Mass., 419, 128 N. E., 713, in which the plaintiff received an injury to his eye by reason of a locomotive cinder coming through the front door of the car in which he was riding. In that case, the court said it is common knowledge that under present conditions coal-burning locomotives can not draw a train without emitting cinders and smoke and held it was not negligence on the part of the defendant not to keep windows and doors to passenger cars closed in warm weather in order to exclude such cinders, and gave judgment for the defendant. On the other hand, it has been held, with reference to injuries to passengers by sparks or cinders, that the question of liability is for the jury. See cases cited by the annotator in 11 A. L. R., beginning on page 1076. The statement of law found in 10 American Jurisprudence, in section 1252, page 172, would seem to be sound, viz.:

> "While it is undoubtedly true that a passenger must take the risks incident to the mode of travel and the character of the means of conveyance which he adopts, such risks are only those which cannot be avoided by the carrier by the use of the

utmost degree of care and skill in the preparation and management of the means of conveyance."

The failure to submit to the fact-finding jury the questions whether the defendant exercised requisite care in "the preparation and management" of its bus with reference to the open window and should have reasonably anticipated to result therefrom "peril or injury" to its passenger, Mrs. Gould, entitles the exceptants to have their fourth exception sustained.

Exceptions sustained.

GALLAGHER *vs.* AROOSTOOK FEDERATION OF FARMERS.

Aroostook. Opinion, November 5, 1938.

CHATTEL MORTGAGES.

Accounting between mortgagor and mortgagee belongs exclusively to the jurisdiction of the court in equity and in stating accounts determination must be governed by the equities between the parties. Ofttimes the amount for which a party is charged or credited depends not upon the actual sum received or paid. It is not necessarily a matter of contractual relations between the parties.

In mortgagor's suit for redemption of mortgage on potatoes and for accounting by mortgagee, who had taken possession of and stored the potatoes, alleged error in excluding testimony concerning cost of storage of potatoes, during a particular part of a season, was not prejudicial, where the record clearly showed that the amount paid to the warehouseman was the same for a part as for the whole of the season.

On exceptions. Bill in equity for redemption of chattel mortgage and for an accounting, instituted by one Gallagher against Aroostook Federation of Farmers. Defendant filed exceptions to decree for plaintiff and to exclusion of testimony. As to exceptions relative to testimony excluded there appeared no prejudicial error. To the decree entry is exception sustained. Decree modified as opinion indicates. Cause remanded. Case fully appears in the opinion.

Pattangall, Goodspeed & Williamson,
Pendleton & Rogers, for plaintiff.
O. L. Keyes,
David Solman, for defendant.

SITTING: DUNN, C. J., STURGIS, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. Bill in equity for redemption of chattel mortgage and for an accounting. The cause was before the Court previously on appeal from decree of a single justice and is reported in 135 Me., 386, 197 A., 554. The appeal was sustained in one particular only and the cause was remanded for further hearing upon that point. On May 7, 1936, a crop of potatoes, to be raised during the following summer season, was mortgaged by the plaintiff to the defendant. The crop as harvested was placed in hired storage by the defendant against the protest of the plaintiff. Upon the accounting a charge of $922.50 for such storage was disallowed. In the former decision by this Court, it was held under the circumstances of the case that the defendant was not entitled to possession of the potatoes until default, and not entitled to any charge for storage until that time. The decision proceeds:

> "The mortgage was in default on December 2 (1936) when foreclosure proceedings were instituted. There can be no denial of the right to charge for storage from that time. . . . The defendant being entitled to possession from December 2, and to all reasonable and actual expenses in caring for the potatoes from that time, the proper amount for storage must be allowed. As it does not appear of record what such amount would be, it must be determined by the sitting Justice."

From the findings made by the sitting Justice upon further hearing, it appears that he conceived his duty to be "to determine from pertinent evidence what actual expenses were incurred by defendant in caring for the potatoes from December 2 until dates of sales." He found in effect that a flat charge for storage of potatoes at the rate of fifteen cents per barrel attached as soon as the bins were used, entitled the defendant to such use for the entire season from September to June, but was subject to no discount for removal of any or all of the potatoes in the interim.

Decree held the defendant not entitled to a modification of the original decree and the storage charge was again disallowed.

Exceptions to this decree and to the exclusion of certain testimony relative to the cost of storage during the time that the pota-

toes were lawfully in the possession of the defendant, bring the case forward.

As to the testimony excluded, no prejudicial error appears as the record is already sufficiently clear that the storage paid the warehousemen is the same whether for the whole or a part of the season. If the defendant had not taken possession until lawfully entitled to do so, the amount properly chargeable for storage against the plaintiff would have been the sum actually paid for the entire time.

The point arising under the exception to the decree is that each side seeks to cast upon the other the entire expense of storage, the plaintiff upon the ground that such expense had been incurred by the defendant while it was wrongfully in posssession, and the defendant that the cost of storage from the time when it became entitled to possession would be the same amount and, therefore, should be entirely charged against the plaintiff.

It must be borne in mind that accounting between mortgagor and mortgagee belongs exclusively to the jurisdiction of the Court in Equity. (Pomeroy's Eq. Jur., Par. 1218) and in stating accounts determination must be governed by the equities between the parties. Ofttimes the amount for which a party is charged or credited depends not upon the actual sum received or paid. It is not necessarily a matter of contractual relations between the parties. The fundamental doctrine that he who seeks equity must do equity has cogent force. Many cases of this character illustrate its application. *Rowell* v. *Jewett*, 73 Me., 365 at 369; *Wilcox* v. *Cheviott*, 92 Me., 239, 42 A., 403; *Bradley* v. *Merrill*, 88 Me., 319, 34 A., 160; *Miller* v. *Ward*, 111 Me., 134, 88 A., 400; *Exchange State Bank* v. *Farmers State Bank* (Kan.), 237 P., 936; *Whiting* v. *Adams*, 66 Vt., 679, 30 A., 32.

The mortgagee being lawfully in possession from December 2, 1936 to April 2, 1937 was under the duty to care for and protect the property. If it had storage space of its own and incurred no actual expense, it would still be entitled to a reasonable charge. The plaintiff lost his right of possession through his own default. He still was entitled to and had the benefit of the care taken of the mortgaged property by the defendant. It is equitable that he should account for a reasonable charge therefor.

Accordingly, as to the decree of the sitting Justice in this particular, the entry must be

Exception sustained.
Decree modified as opinion indicates.
Cause remanded.

EDWARD DEROSBY *vs.* ALEX A. MATHIEU

Kennebec. Opinion, November 5, 1938.

NEW TRIAL. COURTS.

The statute authorizing the granting of a new trial, where a party gives to any of the jurors who try the cause any treat or gratuity, makes no distinction as to the time of giving such treat or gratuity so long as it occurred at the same term of court when the case was tried.

In cases where new trials are sought on grounds that a juror or jurors have been given a gratuity, the better practice is to present the motion directly to the Law Court. The motion, however, may be presented to the presiding Justice.

It is clear, however, that upon motions presented to the Law Court the doctrine that the decisions of the court stand as precedents for future guidance, would apply. While the presiding Justice may under the statute be clothed with discretionary power, yet such authority must be exercised in accordance with settled doctrines enunciated by the Law Court as vital and essential requisites to the proper trial of cases and the administration of justice.

On exceptions. This case comes up on exceptions to the refusal of the presiding Justice to grant a new trial for alleged violation of R. S., Chap. 96, Sec. 111 relative to giving a gratuity to jurors. The motion was presented to the presiding Justice upon an agreed statement of facts. Motion denied. Exceptions. Exceptions sustained. Case fully appears in the opinion.

Arthur Cratty, for plaintiff.

F. Harold Dubord (Law Court only)

A. A. Matthieu,

William H. Niehoff, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. This case comes up on exception to the refusal of the presiding Justice to grant a new trial for alleged violation of R. S., Chap. 96, Sec. 111. This statute reads:

> "If either party, in a cause in which a verdict is returned, during the same term of the court, before or after the trial, gives to any of the jurors who try the cause, any treat or gratuity, . . . the court, on motion of the adverse party, may set aside the verdict and order a new trial."

The motion was presented to the presiding Justice upon an agreed statement of facts, in substance as follows: After rendition of verdict, counsel for the plaintiff, and the plaintiff and two of his witnesses, were about to return from Augusta to Waterville in his automobile when a juror living at Waterville requested a ride thereto at the suggestion of a deputy sheriff. It was further stipulated and agreed that there was no improper motive in granting the gratuity to the juror.

The Court in recent decisions has spoken with definite certainty and clarity in interpretation of the statute here invoked.

In *York* v. *Wyman*, 115 Me., 354, 98 A., 1024, appears the following:

> "We have placed the seal of condemnation, not alone upon the attempts of parties by word or deed to influence or prejudice jurors outside the court room, but also upon the indiscretion of their friends along the same line. And we have not stopped to inquire whether the attempt was successful, nor whether the mind of a juror was actually influenced, but only whether or not the mind of a juror might have been influenced by the attempt, or whether the attempt might have any tendency to influence the mind of the juror."

This language is reiterated in *Bean* v. *Fuel Co.*, 125 Me., 260. In that case, counsel for the plaintiff tendered to one of the jurors and the latter accepted gratuitous conveyance in an automobile of such counsel over a distance which would have, by public convey-

ance, entailed upon the juror the expenditure of money. There, the gratuity was offered and accepted before the trial ended. In the present case it was after verdict.

The statute, however, makes no distinction so long as it occurred at the same term of court. As said in *Ellis* v. *Emerson*, 128 Me., 379, 147 A., 761, 762:

> "The statute seeks to safeguard the verdict during the term, after, as well as before, the trial. It is the duty of this court to give such liberal construction to the statue as will most effectually meet the beneficial end in view, prevent a failure of the remedy and advance right and justice. To effectuate the legislative intent cases within the reason of the law must be included."

In almost all of the cases of this character, the motion for a new trial has been presented directly to the Law Court. This is the better practice. In *Walker* v. *Bradford*, 117 Me., 147, 103 A., 15, however, the method here adopted of presenting the motion to the presiding Justice was used and it was held that the power of the Trial Court to compel obedience to or remedy unwarranted interference with the administration of justice was inherent in all common-law courts.

It is clear, however, that upon motions presented to the Law Court the doctrine that the decisions of the court stand as precedents for future guidance would apply. Positive is the declaration in *State* v. *Brown*, 129 Me., 169, 151 A., 9 (where again the motion was made to the presiding Justice and overruled), as follows:

> "Statutory intention is that, where treat or gratuity has had, or might have had, an effect unfavorable to the opposing party, the verdict, whether right or not, should be set aside."

> "Better that there should be the disturbance of a verdict, the case in which it is returned to stand for trial anew—better, even, that a guilty person should escape punishment—than that there should be countenance of a verdict not free from improper influence, or the suspicion thereof. The appearance of evil should as much be avoided as evil itself. Too much care and precaution cannot be used to keep jury trials pure."

Therefore, while the presiding Justice may under the statute be clothed with discretionary power, yet such authority must be exercised in accordance with settled doctrines enunciated by this Court as vital and essential requisites to the proper trial of cases and the administration of justice. The entry must be

Exceptions sustained.

CHARLES B. DALTON *vs.* HENRY J. LESSARD.

Cumberland. Opinion, November 8, 1938.

LANDLORD AND TENANT. LEASE.

A tenant, even though the duty to pay a tax is on the landlord, can not buy in the property at a tax sale and hold it against his lessor.

A tenant purchasing a tax title can not in equity found a claim on it hostile to his landlord, even though it was the landlord who was in default for the non-payment of the taxes. He holds such property in trust.

A landlord, who gave tenant no notice of default for non-payment of taxes, although lease provided that there should be no forfeiture until expiration of sixty days after written notice of default, could not sever relationship of landlord and tenant and become entitled to possession of the premises as against tenant, by purchase of tax title acquired by city after tenant's failure to pay taxes.

On exceptions. Action on a writ of entry to recover possession of certain real estate. The case was referred. Referee found plaintiff entitled to judgment. Defendant excepted to the acceptance of the Referee's report. Exception overruled. Case fully appears in the opinion.

Gould & Shackley, for plaintiff.

Francis W. Sullivan, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. This action on a writ of entry was brought August 5, 1937 to recover possession of certain real estate situated in Portland. The case was referred, and to the acceptance of the Referee's report, which held that the plaintiff was entitled to judgment, the defendant excepted.

The facts are not in dispute. On February 16, 1921, the defendant leased the premises in question to the plaintiff for a term of twenty years from April 18, 1921. On March 24, 1921 the plaintiff assigned his rights in the lease to one True as collateral security for some independent obligation. On May 5, 1921 the plaintiff entered into an agreement with Rosenberg Brothers, a partnership, under the terms of which Rosenberg Brothers were to erect certain buildings on the property, and the lease was to be assigned to them. On the same day True, under instructions from the plaintiff, assigned the lease to Rosenberg Brothers, who subsequently assigned to Rosenberg Brothers, Inc., a corporation which was adjudicated a bankrupt September 28, 1935. On October 5, 1936 the trustee in bankruptcy of the above corporation conveyed the interest of the bankrupt to the plaintiff.

These various assignments, subleases, and reassignments have but little to do with the point at issue before us. In spite of them all, the Referee has found that the plaintiff, at least from July 6, 1921 to the time of the commencement of the action, had been entitled under the lease to the rights of a lessee of the property as against the defendant, and that the defendant in taking possession on March 16, 1935 disseized the plaintiff. The defendant, however, claims a right to possession of the premises by reason of the following facts.

Under the provisions of the lease, the lessee covenanted and agreed to pay all taxes assessed against the premises during the term. There was a breach of this covenant. For non-payment of taxes for the year 1932, the collector of the City of Portland had sold the property. A tax deed was executed by the collector, delivered to the City of Portland, and held by its treasurer during the two-year period within which the property might have been redeemed. About a month thereafter, the defendant, the lessor of the premises, purchased the property of the city and received and re-

corded the quitclaim deed therefor. It is on this deed that he bases his claim of title.

Against such contention the plaintiff calls attention to the following provision of the lease: "And it is mutually agreed and understood that the Lessor may enter to view the premises and that in the event that the said Lessee shall violate or shall become in default of any of his covenants under this lease, especially that as to waste, which default or breach shall continue for sixty (60) days after written notice thereof by said Lessor, said written notice to be given in hand to the Lessee or if after reasonable search the Lessee cannot be found, to be left at the Lessee's last or usual place of abode, the buildings and fixtures on the leased premises shall become the property of the Lessor without any appraisal or any payment therefor and this lease shall thereupon become null and void and the term hereof ended." No notice of any default had been given to the plaintiff in compliance with this provision, and he claims that accordingly he still remained a tenant of the lessor in spite of the lessor's deed from the city. His contention is well founded.

The defendant admits that a mortgagor can not buy in a tax title and assert it successfully against a mortgagee, *Dunn* v. *Snell*, 74 Me., 22; *Phinney* v. *Day*, 76 Me., 83; that a life tenant, on whom is the burden to pay taxes, can not successfully set up a tax title as against a remainderman, *Varney* v. *Stevens*, 22 Me., 331; that a tenant, whose duty it is to pay taxes, can not enforce such a title against his landlord, *Haskell* v. *Putnam*, 42 Me., 244. Defendant's counsel argues that in each of these cases the claimant, on whom was the obligation to pay the taxes, was attempting in asserting the tax title to take advantage of his own default in failing to pay, and that the cases are not in point because in the instant case, the obligation to pay the tax being on the lessee, the property was not being claimed by one who was himself in default. But the reasons underlying the general doctrine go much deeper than counsel assumes.

In *Smith* v. *Specht*, 58 N. J. Eq., 47, 42 A., 599, a broad dictum is laid down that a tenant, even though the duty to pay a tax is on the landlord, can not buy in the property at a tax sale and hold it against his lessor.

In *Waggener* v. *McLaughlin*, 33 Ark., 195, it is held that a tenant purchasing a tax title can not in equity found a claim on it

hostile to his landlord, even though it was the landlord who was in default for the non-payment of the taxes. He holds such property in trust.

See also Note 89, Am. Stat. Rep. 84; Note 15, Am. Dec. 690; Note 53, L. R. A. 940.

The decisive factor is not that the obligation to pay the tax rests on the one asserting the title, but the real question is whether on broad equitable grounds he should be estopped to assert the title which he holds.

In the case before us this defendant, the lessor of these premises, agreed that there should be no forfeiture until the expiration of sixty days after written notice of a default should be given by the lessor to the lessee. No such notice was given. The plaintiff, in accordance with the terms of the lease, remained the tenant of the defendant, and the defendant in contravention of that agreement could not sever that relationship by the purchase of the tax title acquired by the City of Portland.

The lessee was by the agreement of the parties given a certain time to make good a default; he was in a position analogous to that of a mortgagor who had a definite period within which to redeem. The other party could not by the purchase of a tax title cut off that right.

Exception overruled.

HOULTON TRUST COMPANY,
PETITIONER FOR MANDAMUS

vs.

EAST BRANCH LAND COMPANY ET AL.

Aroostook. Opinion, December 14, 1938.

MANDAMUS.

When order for peremptory writ of mandamus was not inclusive of executrix, who had been named defendant in petition, the executrix was not, in a legal sense, aggrieved.

It is not open to executrix to insist invalidity in the sale of collateral where the notes still remain unpaid in part.

On exceptions. Mandamus proceeding to require the East Branch Land Company, the president and treasurer of that corporation, to transfer certain shares of its capital stock, issued and outstanding in the name of the Houlton Trust Company, as pledgee, to such banking institution as the outright owner thereof. Exceptions overruled. Case fully appears in the opinion.

Bernard Archibald, for petitioner.

Raymond S. Oakes, for exceptants.

SITTING: DUNN, C. J., STURGIS, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. This is a mandamus proceeding to require the East Branch Land Company, and the president and treasurer of that corporation, to transfer certain shares of its capital stock, issued and outstanding in the name of the Houlton Trust Company, as pledgee, to such banking institution as the outright owner thereof.

Ansel L. Lumbert, then of Houlton, since deceased, originally owned the stock. He deposited his certificates as general collateral

security for the payment of promissory notes given by him to the bank, the instant petitioner.

Evidence tends to show, as to principal, a partial reduction in the instance of one note only. All the notes are in suit.

There is evidence of the pledge, by the executrix of Mr. Lumbert's last will, to secure her own two notes, of the already pledged certificates. These notes are to the order of the same bank as those that, in his lifetime, her testate gave. The executrix' notes are apparently overdue and unpaid.

In this situation, the pledgee sold the collateral, at public auction, to itself (permissible under the deposit agreement), the proceeds to apply on the notes.

But, the East Branch Land Company declined, on suggestion of the executrix, who indicated possible fatal irregularity in the sale of the shares, to issue new certificates.

Issuance of the peremptory writ of mandamus was ordered. The order was not, however, inclusive of the executrix, although in the petition for mandamus she had been named a defendant.

In such connection, the executrix, here exceptant, is not, in a legal sense, aggrieved.

It suffices, in respect to other exceptions, to say that, the notes still remaining unpaid in part, it is not open to the executrix to insist invalidity in the sale of the collateral. See *Winthrop Bank* v. *Jackson*, 67 Me., 570.

Exceptions overruled.

BLANCHE POIRIER *vs.* VENUS SHOE MANUFACTURING CO.

Androscoggin. Opinion, December 29, 1938.

REFERENCE AND REFEREES. MASTER AND SERVANT.

WORKMEN'S COMPENSATION ACT.

Exceptions reserved but not argued will be regarded as waived.

The referees' report is equivalent to a hearing before a judge, where a jury is waived, or to a verdict of a jury, and is prima facie correct.

It may not be said, as a matter of law, that no sufficient evidence supports the factual finding of the referees. It follows that the decision based thereon, being otherwise sound in law, is not exceptionable.

Neither the fellow-servant doctrine, assumption of risk, nor contributory negligence is invokable where the employer, who employed more than five employees, was non-assenting to the protection of the Maine Workmen's Compensation Act.

On exceptions. Action by the plaintiff, a shoe factory employee, to recover for personal injuries sustained while in the employ of the defendant. Case tried before referees who reported in favor of the plaintiff. Defendant excepted to overruling of written objections and to the acceptance of the report of the referees. Exceptions overruled. Case fully appears in the opinion.

Adrian A. Cote,
Harris Isaacson, for plaintiff.
Berman & Berman (Lewiston, Maine), for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, JJ.

DUNN, C. J. The plaintiff, a shoe factory employee, sustained personal injuries, under circumstances which, she alleges, entitle her to damages from the corporate defendant, her employer.

The theory of this action is a failure, sounding in negligence,

and amounting to a lack, on the part of the defendant, of the exercise of ordinary care to keep a certain sewing machine in a reasonably safe and reasonably suitable condition for use.

On November 26, 1937, plaintiff was about to begin her daily work of running the machine.

She contends that repeated movement of the machine needle, first down and then up, through leather, some of it glued or cemented together, had already clogged the shuttle, which caused the machine to stitch irregularly.

On any such occurrence, it was plaintiff's duty, so she avers, to reset the shuttle, that the machine might sew to approval.

Plaintiff proceeded to put the mechanism in working order. She tilted the machine head back until it rested on a support five and one-half inches in height, that she herself had improvised, this consisting of an empty thread spool placed upright on the back of the bench of the machine.

She made use of the spool, there is evidence, because a horizontal rod, which the manufacturer of the machine had fitted to support its head when tipped to expose the shuttle and threading arrangement, thus making them available for repair and cleaning, had, by someone other than the plaintiff, been removed. In place of the rod, an iron nail had been substituted. This had been put in an opening on the machine bench, but because the nail stood, as is testified, but one and one-half inches high, (there is testimony it was somewhat higher,) the tipped head might not rest thereon securely; its weight, the center of gravity of the head being shifted, was liable to bear it completely over, rip it from its hinges, tear it from its base, and cause it to fall onto the factory floor.

So much for contention.

The head of the machine suddenly and unexpectedly fell forward and downward, crushing plaintiff's right hand, with which it came in contact, in such a manner as to amputate her index finger at its first joint.

Whether plaintiff shall prevail in her action must be determined with reference to the insistence of her obligation, growing either expressly or impliedly out of her contract of employment, to clean and adjust the sewing machine.

About this, there was sharp conflict in the evidence.

Did plaintiff, in respect to that factual proposition, fairly maintain, on all the evidence, the burden of proof? Answer to this question would, the defense having argued in the instant court only that, not its negligence but plaintiff's own sole fault caused her hurt, determine the whole controversy. Exceptions reserved but not argued will be regarded as waived. *Byron* v. *O'Connor*, 131 Me., 35, 158 A., 855.

Referees, to whom the trial court sent the case, found for plaintiff, and awarded her seven hundred and fifty dollars. The report by the referees, to the court of their appointment, survived objection and was accepted.

The referees' report is equivalent to a hearing before a judge, where a jury is waived, or to a verdict of a jury, and is prima facie correct. *Bourisk* v. *Mohican Co.*, 133 Me., 207, 175 A., 345.

On the facts, the case was close.

However, it may not be said, as a matter of law, that no sufficient evidence supports the factual finding of the referees. It follows that the decision based thereon, being otherwise sound in law, is not exceptionable. Rules of Supreme Judicial and Superior Courts, rule 42; *Jordan* v. *Hilbert*, 131 Me., 56, 158 A., 853; *Staples* v. *Littlefield*, 132 Me., 91, 167 A., 171; *McCausland* v. *York*, 133 Me., 115, 174 A., 383.

Neither the fellow-servant doctrine, assumption of risk, nor contributory negligence is invokable where, as here, the employer, who employed more than five employees, was non-assenting to the protection of the Maine Workmen's Compensation Act. R. S., Chap. 55, Sec. 1, *et seq.*; *Nadeau* v. *Caribou Water, etc., Company*, 118 Me., 325, 108 A., 190; *Amundsen* v. *Thompson*, 130 Me., 520, 156 A., 927; *Hatch* v. *Portland Terminal Company*, 125 Me., 96, 131 A., 5.

The exceptions present no error.

Exceptions overruled.

INHABITANTS OF TOWN OF CANTON

vs.

LIVERMORE FALLS TRUST COMPANY.

Oxford. Opinion, January 7, 1939.

TAXATION. DEEDS. CONSTITUTIONAL LAW.

Where mortgagee never had seizin or possession of the mortgaged lands, the mortgagors were taxable.

A grantor cannot destroy his own grant; having once granted an estate in his deed, no subsequent clause even in the deed itself can operate to nullify it.

Where town quitclaimed premises to grantee words in the deed relative to cancelling tax lien certificates would not nullify the prior grant.

A quitclaim deed, whatever may have been its office at common law, is, in virtue of declaratory legislation, a suitable instrument for the conveyance of real property.

A deed of quitclaim gives to the grantee a record title.

As a general rule, assessors, in laying assessments, may, on the showing of a formally sufficient recorded deed, even a tax deed, and without reference to anything else, treat the holder as the record owner of the realty.

R. S., Chap. 14, *Sec.* 30, *making the owner of a record title to real estate assessable, does not include an obligation of the assessors to make a further examination of the record.*

One who would strike down a statute as unconstitutional, must show that it affects him injuriously, and actually deprives him of a constitutional right.

He who is not injured by the operation of a law cannot be said to be deprived by it of either constitutional right or of property.

On report on agreed statement of facts. Action by the Inhabitants of the town of Canton against Livermore Falls Trust Company to enforce collection of taxes. Case remitted. Judgment for

plaintiffs in the amount of $171.00, with taxable costs. Case fully appears in the opinion.

Aretas E. Stearns, for plaintiff.

Benjamin Butler, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. This case was reported on an agreement of facts. R. S., Chap. 91, Sec. 9.

As of April 1, 1937, taxes were laid against the defendant, by assessors of the town of Canton, on certain lots or parcels of land, some with buildings, there situate. The taxes are unpaid.

By direction of the selectmen, this action to enforce collection was commenced. R. S., Chap. 14, Sec. 64.

The question first to be considered is if, at the date of the listing or assessment of the real estate, defendant had record title thereto. R. S., *supra*, Sec. 30.

There is no occasion to inquire whether defendant had such a title as belongs to a person who in fact has full and unconditional ownership. Of concern here is, if it was proper for the tax assessors to connect the defendant with a record title to the property. His title purported to have been regularly derived, by a quitclaim deed, valid on its face, and recorded in the public registry. The town of Canton lies in Oxford county.

On the eighteenth day of December, 1922, one of the lots of land of 1937 taxation was conveyed to defendant by mortgage, which, on the fifth day of January, 1923, had been duly recorded.

The other lots also were conveyed to defendant by mortgage. This mortgage is dated May 10, 1927; it was recorded May 19, 1927.

That the mortgagee never had actual seizin or possession of the mortgaged lands, or any of them, seems to be conceded. The mortgagors were, therefore, taxable. R. S., Chap. 13, Sec. 9.

In 1933, the mortgagors were taxed, respectively.

Neither paid his taxes.

The tax collector, seasonably invoking the provisions of P. L. 1933, Chap. 244, as amended by P. L. 1937, Chap. 136, left in

service with the respective mortgagors, in reference to his ownership, written and officially signed notice, in the case of every lot, describing it, and stating, among other things, the extent of tax delinquency; each notice set forth a tax lien, and demanded that, within ten days, discharging payment be made.

The demands were ignored.

The collector, in intended compliance with the terms of the amended act, (of latest citation,) filed certificates in the registry of deeds. He lodged copies with the town treasurer; he mailed, under cover of prepaid and registered mail, still other copies, to the mortgagors, each for himself, and not one for the other.

The act of 1933 provides:

> "Sec. 2. Filing of certificate to create mortgage. The filing of the certificate, provided for in section 1, in the registry of deeds as aforesaid shall be deemed to create and shall create a mortgage on said real estate to the town in which the real estate is situated having priority over all other mortgages, liens, attachments and encumbrances of any nature, and shall give to said town all the rights usually incident to a mortgagee, except that the mortgagee shall not have any right of possession of said real estate until the right of redemption herein provided for shall have expired.
>
> "Sec. 3. Foreclosure provisions. If said mortgage, together with interest and costs, shall not be paid within 18 months after the date of the filing of said certificate in the registry of deeds as herein provided, the said mortgage shall be deemed to have been foreclosed and the right of redemption to have expired.
>
> "Sec. 4. Notice. The filing of said certificate in said registry of deeds shall be sufficient notice of the existence of the mortgage herein provided for."

On the nineteenth day of May, 1936, the town of Canton, through the medium of its selectmen, who had been, by a vote of the town, invested with power so to do, did "remise, release, bargain, sell and convey, and forever quit-claim unto said Livermore Falls Trust Company .... the following described real estate ...." (all the lots, admittedly).

In the deed, following the general description of the granted premises, and before the habendum, there are recitals, in effect, that the conveyance of the several different lots is with purpose to release or annul the tax lien certificates.

A grantor cannot destroy his own grant; having once granted an estate in his deed, no subsequent clause even in the deed itself can operate to nullify it. *Maker* v. *Lazell*, 83 Me., 562, 22 A., 474; *Shepherd Company* v. *Shibles*, 100 Me., 314, 61 A., 700.

The words in the deed to the defendant, relative to cancelling tax lien certificates, do not modify the prior grant. *Maker* v. *Lazell*, supra; *Shepherd Company* v. *Shibles*, supra. Indeed, on the part of the individual tax debtors, themselves, any right to redeem could not have then been asserted; the time had gone. On the theory of the statute, the town was now owner, absolutely.

The deed, plaintiff town to defendant bank, was recorded on the twenty-first day of May, 1936; this at the instance of the grantee.

A quitclaim deed, whatever may have been its office at common law, is, in virtue of declaratory legislation, a suitable instrument for the conveyance of real property. R. S., Chap. 87, Sec. 20; *Abbott* v. *Chase*, 75 Me., 83, 90. A deed of quitclaim gives to the grantee a record title. *Connolley, Petr.*, 168 Mass., 201, 46 N. E., 618. See, too, *Tibbetts* v. *Holway*, 119 Me., 90, 109 A., 382.

As a general rule, assessors, in laying assessments, may, on the showing of a formally sufficient recorded deed, even a tax deed, and without reference to anything else, treat the holder as the record owner of the realty. Cooley on Taxation, (3rd ed.) Vol. 1, page 732; *Roberts* v. *Welsh*, 192 Mass., 278, 78 N. E., 408; *Rogers* v. *Lynn*, 200 Mass., 354, 86 N. E., 889; *Solis* v. *Williams*, 205 Mass., 350, 353, 91 N. E., 148; *Conners* v. *Lowell*, 209 Mass., 111, 121, 95 N. E., 412.

The statute (R. S., Chap. 14, Sec. 30,) making the owner of a record title to real estate assessable, does not include an obligation of the assessors to make a further examination of the record. *Conners* v. *Lowell*, supra; *French* v. *Spalding*, 61 N. H., 395.

Counsel for defendant strenuously claims that the tax certificate statute (P. L. 1933, Chap. 244, as amended), transcends constitutional provisions, both State and Federal. Constitution of Maine, Art. 1; Constitution of United States, Amendment 14.

He argues, on his brief, that the statute makes a practical confiscation of property; that there is deprivation without due process. It is not competent, is stress, for the law-making department of government to vest in the taxing town, on non-payment of taxes, an outright and indefeasible title to real estate, unless the owner shall first have been afforded opportunity to appear and be heard, before some tribunal or board empowered to grant relief, and advance any defenses he may have, going to the legality of the tax, or the liability of his estate therefor. So is contention.

The argument of unconstitutionality does not reach this case, because the statute does not affect it.

The defendant cannot be injured, but obviously may be benefited by the statute. On it, as a foundation, rests the deed from the town; that deed, defendant, as grantee, accepted, recorded, and retains. The transaction was in good faith, entirely.

One who would strike down a statute as unconstitutional, must show that it affects him injuriously, and actually deprives him of a constitutional right. Headnote: *Southern Railway Company* v. *King*, 217 U. S., 524, 54 Law ed., 868, 30 S. Ct., 594.

"He who is not injured by the operation of a law . . . . cannot be said to be deprived by it of either constitutional right or of property." *Cusack Company* v. *Chicago*, 242 U. S., 526, 61 Law ed., 472, 37 S. Ct., 190. See *Chapman* v. *Portland*, 131 Me., 242, 160 A., 913.

The recorded deed was, on the facts agreed, effectual to invest a record title to the real estate it described, and ostensibly at least, conveyed.

The case is remitted. On the authority of a stipulation in the report, judgment should go for plaintiffs; the amount $171.00, with taxable costs.

It is so ordered.

GEORGE A. MIDDLETON'S CASE.

Sagadahoc. Opinion, January 9, 1939.

WORKMEN'S COMPENSATION ACT. STATUTES, CONSTRUCTION OF.

The Industrial Accident Commission may not enforce its orders and decisions by process emanating from itself.

The Legislature has indicated, as enforcing machinery, the entry, as a matter of form, by any Justice of the Superior Court, of a decree which shall conform to the conclusion of the Industrial Accident Commission.

The intent, rather than the letter of the statute, as the statute itself, read in the light of legislative purpose, expresses such intent, should prevail.

The true meaning of any clause or provision is that which best accords with the subject and general purpose of the statute.

The general purpose of R. S., Chap. 55, Sec. 40, was to facilitate finality of decision in respect to whether an injured workman was, or not, within the protection of the compensation law.

When petitioner filed certified copies of decision of Industrial Accident Commission with Clerk of Courts, when Superior Court was in vacation, and awaited the coming in circuit of a Justice, who then signed decree, after which appeal was taken within ten days, the respondent was not prejudiced.

The finding of the Industrial Accident Commission sustained by evidence is conclusive on the courts.

On appeal. Petitioner made application to Industrial Accident Commission for further compensation based on an alleged recurrence of a hernia. Petition dismissed. Petitioner appeals. Appeal dismissed. Decree below affirmed. Case fully appears in the opinion.

Edward W. Bridgham,
Harold J. Rubin, for appellant.
William B. Mahoney, for appellees.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. The petitioner-appellant, who will hereinafter be called petitioner, suffered, on January 29, 1937, a personal injury by accident arising out of and in the course of his employment.

The result was a hernia in the man's left groin. The hernia, with its sac, having been surgically replaced, was then subjected to a constant compression, by means of a truss.

Compensation for incapacity was awarded the injured employee.

In June, 1937, the abdominal parts which surgery had divided having healed, the employee, medical authority to which he had recourse approving, returned to his work in a shipyard.

He had steady employment until February 6th, 1938, when he was laid off.

Perceiving later, so is his testimony, that he was afflicted with a recurrence of the hernia, he applied, on February 25, 1938, for further compensation.

The case came on for hearing before a single member of the Industrial Accident Commission.

Controversy narrowed, on the pleadings, to whether the petitioner's disability was attributable to a reappearance of his former hernia; the respondent-appellee (hereinafter styled respondent only) interposed contention of a new hernia.

The commissioner, on finding that the petitioner had not established the truth of the given issue by such a quantum of evidence as the law demands, ordered the petition dismissed.

The Industrial Accident Commission, it is pertinent here to notice, may not enforce its orders and decisions by process emanating from itself.

The Legislature has indicated, as enforcing machinery, the entry, as a matter of form, by any Justice of the Superior Court, of a decree which shall conform to the conclusion of the Industrial Accident Commission. R. S., Chap. 55, Sec. 40.

The statute is that any person in interest may present, within twenty days, to the Clerk of Courts in the county where the accident occurred, (the expression "court" of later use obviously means the same thing), certified copies of Commission orders and de-

cisions, together with accompanying papers, whereupon there shall be the signing and entry of decree accordingly. R. S., *supra.*

The petitioner duly filed certified copies of the decision bearing date April 25, 1938, and of the appertaining documents, in the office of the Clerk of Courts in Sagadahoc, the proper county.

A decree was not actually signed until June 14, 1938.

In Sagadahoc county, no Superior Court Justice has, in the sense of domicile, his residence.

The court itself was in vacation.

Call for statute construction presents.

The intent, rather than the letter of a statute, as the statute itself, read in the light of legislative purpose, expresses such intent, should prevail. *Winslow* v. *Kimball*, 25 Me., 493; *Gray* v. *Commissioners*, 83 Me., 429, 22 A., 376; *In re Penobscot Lumbering Association*, 93 Me., 391, 45 A., 290; *Cheney* v. *Cheney*, 110 Me., 61, 85 A., 387; *Tremblay* v. *Murphy*, 111 Me., 38, 88 A., 55; *State* v. *Blaisdell*, 118 Me., 13, 105 A., 359; *Bowen* v. *Portland*, 119 Me., 282, 111 A., 1; *Howe* v. *Gray*, 119 Me., 465, 111 A., 756. Spirit and purpose and policy are to be regarded. Sutherland, Statutory Construction, (2d ed.), sec. 348; *Gray* v. *Commissioners*, supra. The object the statute designs to accomplish serves oftentimes as a key to intricacies. The true meaning of any clause or provision is that which best accords with the subject and general purpose of the statute. *Holmes* v. *Paris*, 75 Me., 559; *Stewart* v. *Small*, 119 Me., 269, 110 A., 683; *Tarbox* v. *Tarbox*, 120 Me., 407, 115 A., 164.

The general purpose of this statute was to facilitate finality of decision in respect to whether an injured workman was, or not, within the protection of the compensation law.

Petitioner seasonably filed the papers in the Clerk's office. But respondent might have done so, and might have procured, perhaps, the signing of a decree by a Justice of the court. So far as appears, it neither did the one thing nor made effort to do the other.

Petitioner, having filed the papers, awaited the coming in circuit of a Justice of the Superior Court, in June; the decree, as stated before, was then signed.

This, nothing disclosing to the contrary, was done, to be effective as of the appointed time. *Ellis* v. *Warren*, 35 Me., 125; *Toole*

v. *Bearce*, 91 Me., 209, 39 A., 558; *Dunn* v. *Motor Company*, 92 Me., 165, 42 A., 389.

Respondent was not prejudiced; the appeal was within ten days.

On the merits, the appeal must fail.

The petitioner himself bore witness that, ever since the 1937 operation, his left inguinal region had been increasingly sore, and that, had he not been laid off, he would have quitted his job.

The petitioner's wife, witnessing, said that her husband always, after the operation, complained of pain and soreness, and that, by way of possible relief, he would lie abed.

Such condition, a doctor testified, was not unusual following a surgical operation, and might continue indefinitely.

A medical witness called by petitioner said, on the stand, that the latter had, on physical examination on March 8, 1938, "a small hernia near the upper angle of the old one."

Q. "Is this a new hernia or is it an old one?"
A. "I can't tell you, sir. It is right close to the upper end of the old skin incision. . ."
Q. "Well, is there any way to determine whether this is through the scar of the first (alluding to a herniated condition repaired in 1932) or second (1937) incision?"
A. "I don't know of any way to determine that."

The surgeon who operated in 1937 was called to witness. He answered the question:

"And what was his (petitioner's) condition when you discharged him for work?" in this wise:

"He was cured and the wound area was solid."

The witness placed the 1938 hernia one and one half or two inches above the 1937 one.

Q. "Do you think there was a recurrence of the 1937 hernia?"
A. "I don't think so."
Q. "You think that was a new hernia?"
A. "Apparently, from the location."

The commissioner's finding, preliminary to his order of dismissal, is as follows:

"The employee failed to sustain the burden of proving that the present hernia is a recurrence of the hernia sustained in 1937, or that any incapacity to work since February 6, 1938, is the result of the accident of January 29, 1937."

Abundant evidence sustains negation. Such finding is conclusive on the courts. *Kilpinen's Case*, 133 Me., 183, 175 A., 314.

Appeal dismissed.
Decree below affirmed.

WILLIAM F. FRYE *vs.* AMASA R. KENNEY.

JAMES S. LOUNSBURY *vs.* SAME.

LAURA U. LOUNSBURY *vs.* SAME.

Penobscot. Opinion, January 12, 1939.

NEGLIGENCE. NEW TRIAL.

When evidence, viewed in light most favorable to plaintiffs, compels factual findings by impartial reasoning minds that an automobile collision was caused solely by icy condition of highway and without any negligence by defendant, the court would be required to grant defendant's motion for new trial.

Cases involving injury due to the skidding of an automobile are dependent for decision upon the particular facts shown.

In the absence of exceptions, it is assumed that the issue was stated to the jury with proper instructions.

The Law Court can not substitute its own judgment for that of the jury when there is sufficient evidence upon which reasonable men might differ in their conclusions.

On motions for new trial. Actions by plaintiffs against defendant for damages arising out of collision of motor vehicles. Verdicts for the several plaintiffs. Defendant files motions for new trial. Motions overruled. Cases fully appear in the opinion.

Gillin & Gillin, for plaintiffs.
Fellows & Fellows, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. On motions by defendant to set aside verdicts as against the law and evidence. The three cases were tried together and arose from an automobile collision. James S. Lounsbury, one plaintiff, was the owner and operator of one of the cars involved in the accident, the other plaintiffs, Laura U. Lounsbury, his wife, and William F. Frye being passengers in his car.

The accident occurred February 19, 1938 at about 4:30 P.M. on the state highway between Bangor and Orono near the Eastern Maine General Hospital. There was evidence that in the vicinity of the accident the highway is of two-lane cement eighteen feet in width with additional level surface on one side of about four and one-half feet and on the other of approximately nine feet. The highway runs east and west without appreciable curve for some distance in either direction, but on a sharp grade in the vicinity of the collision. The plaintiffs were proceeding easterly toward Orono and the defendant westerly toward Bangor.

Counsel for defendant argues forcefully that the accident was precipitated from the sudden and uncontrollable skidding of his car, caused solely by the admittedly icy condition of the cement surface and without any precedent or immediate negligence upon his part. It is also claimed, but with lesser cogency, that there was contributory negligence on the part of the plaintiffs, both operator and passengers. Analysis of the record might justify the finding that the hill itself was covered with a thin layer of new ice, although the level roadway approaching from either direction was practically bare; that the defendant negotiated the lower and steeper part of the hill without difficulty, going upgrade, driving at a moderate rate of speed and on the right-hand lane of traffic; that suddenly the left rear wheel of his car began to spin and the rear of the car veered slightly toward the center of the road while the forward end pointed toward the right side of the highway; that the predicament was noted by the occupants of the plaintiff car but

without any resultant endeavor or action to avoid collision. Thereupon the defendant, so it is contended, did all that a prudent man could be expected to do in such an emergency to correct the skidding motion of his car, but his attempt to steer it into a straight course resulted in its turning sharply to the left side of the road, where it ran head on into the side of the plaintiffs' moving car.

If the evidence, viewed in the light most favorable to the plaintiffs, compelled such factual findings by impartial reasoning minds, then the Court would be required to grant the motions for a new trial. *Byron* v. *O'Connor*, 130 Me., 90, 153 A., 809.

The recent case of *Marr* v. *Hicks*, 136 Me., 33, 1 A., 2d, 271, discusses the legal principles involved in this case and cites authorities of pertinent application. Obviously, cases involving injury due to the skidding of an automobile, are dependent for decision upon the particular facts shown.

Counsel for the plaintiffs contends that there was testimony which raised jury questions and upon which reasoning minds might differ. It is pointed out that the icy condition of the highway as it existed at the time of the accident and also earlier in the afternoon of the same day when the defendant travelled over it in the opposite direction, was apparent to the defendant; that there arose the consequent duty of driving at appropriate speed both before and at the time of the collision and that this was a controverted element. Stress is placed upon testimony to the effect that the highway was widened out by a broad level space to the right of the defendant, which would have afforded ample opportunity to straighten up his car without danger to anyone. Further, that while argument for the defendant is directed to alleged uncontrollable skidding of his car, yet the sidewise slip of the rear wheels was but a few inches; that the car was still upon the right-hand lane facing forward and to the right, and with proper handling no trouble would have resulted. Instead, it is claimed, there was an admitted acceleration of speed at the moment of skidding, coupled with a sharp pull to the left in the face of the oncoming car of the plaintiffs; and further that the force of the impact as demonstrated by the condition of the damaged cars, supports the contention of negligent operation.

In *Brown* v. *Sanborn*, 131 Me., 53, 158 A., 855, the Court in passing upon the facts therein considered said:

"The situation created no emergency. It was the ordinary condition with which drivers of motor vehicles are frequently confronted. There was nothing to confuse, bewilder, or frighten a driver of ordinary intelligence and experience. The collision could readily have been avoided by the exercise of reasonable care."

The jury might have applied the same reasoning in the instant case.

In the absence of exceptions, it is assumed that the issue was stated to the jury with proper instructions. *Archibald* v. *Queen Ins. Co.*, 115 Me., 564, 99 A., 771. The Court can not substitute its own judgment for that of the jury and we find that there was sufficient evidence upon which reasonable men might differ in their conclusions.

Motions overruled.

INHABITANTS OF THE TOWN OF HOLDEN *vs.* ROSS JAMES.

Penobscot. Opinion, January 12, 1939.

TAXATION.

To exempt property from taxation, the intention of the legislature to exempt it must be expressed in clear and unambiguous terms, that all doubt and uncertainty as to the meaning of a statute is to be weighed against exemption, that taxation is the rule and exemption is the exception.

No uncertainty exists as to the intent of the legislature to exempt household furniture to the aggregate amount of $500. The term is comprehensive instead of particular, generic rather than specific. It refers to articles which, by common acceptation, are included in the general classification. It is not confined to such as may have constituted household furniture at the time of the passage of the statute. The scope of the law is broad enough to include modern inventions which come within its meaning.

The single apartment of an unmarried person may well constitute his abiding place, his home, and contain his household furniture.

"Household furniture" means those things provided for, and appropriated to uses in the house.

A radio intended for the use, comfort, convenience and enjoyment of the owner in his home, is held to be an article of household furniture under provisions of R. S., Chap. 13, *Sec.* 6, *Part IV.*

On report. Action by plaintiff town against defendant to enforce collection of a tax assessed upon a cabinet radio owned by the defendant. Case reported on an agreed statement of facts. Judgment for the defendant. Case fully appears in the opinion.

B. W. Blanchard, for plaintiff.

Michael Pilot, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. On report. Defendant, on April 1, 1936, was an inhabitant of the plaintiff town. He had no family and lived by himself in a single rented room. He owned a cabinet radio valued at $50, which was kept in his room for his own use and enjoyment. The plaintiff town assessed a tax upon this property and brought suit for its collection. The only question presented for determination is whether the property is exempt under the provisions of R. S., Chap. 13, Sec. 6, Part IV. This statute reads as follows:

> "The following property and polls are exempt from taxation:
>
> "IV. The household furniture of each person, not exceeding five hundred dollars to any one family, his wearing apparel, farming utensils, mechanics' tools necessary for his business, and musical instruments not exceeding in value fifty dollars to one family."

Issue is not raised as to exemption as a musical instrument but as to whether the radio in question is an article of household furniture.

The plaintiff relies upon the rule long since established in this state that:

> "In order to entitle any kind of property to exemption from taxation, the intention of the Legislature to exempt it must be

expressed in clear and unambiguous terms, that all doubt and uncertainty as to the meaning of a statute is to be weighed against exemption, that taxation is the rule and exemption is the exception." *Mechanic Falls* v. *Millett*, 121 Me., 329, 117 A., 93, 94, and cases there cited.

No uncertainty exists as to the intent of the legislature to exempt household furniture to the aggregate amount of $500. The term is comprehensive instead of particular, generic rather than specific. It refers to articles which, by common acceptation, are included in the general classification. It is not confined to such as may have constituted household furniture at the time of the passage of the statute. The scope of the law is broad enough to include modern inventions which come within its meaning.

It is further contended that defendant is not a member of a family and is not a householder in the ordinary sense of the term.

Unlike the statute in some of the states, the exemption is not to the head of a family or household, but applies to the individual—"the household furniture of each person." There is no implication that articles which are avowedly within the class, as beds, chairs, tables, must be for the common use of members of the family in order to be entitled to exemption. The single apartment of an unmarried person may well constitute his abiding place, his home, and contain his household furniture.

In *Gooch* v. *Gooch*, 33 Me., 535, we find the definition:

"'Household furniture' means those things provided for, and appropriated to uses in the house; as a clock &c."

Webster defines furniture as:

"Articles of convenience or decoration used to furnish a house, apartment, place of business; especially movable articles such as chairs, tables, beds, cabinets, desks, stoves, etc."

Under the circumstances of this case, a radio intended for the use, comfort, convenience and enjoyment of the owner in his home, is held to be an article of household furniture, and under the terms of the report the entry will be

Judgment for defendant.

MARY E. ROSS *vs.* PORTEOUS, MITCHELL & BRAUN COMPANY.

Cumberland. Opinion, January 17, 1939.

SALES.

No expression of opinion merely, however strong, imports a warranty.

Plaintiff's right to recover on an implied warranty that the dress shields which she bought were reasonably fit for the particular purpose for which they were required as provided in Clause 1 *of Section* 15, *Chapter* 165, *R. S.* 1930, *can not be denied because the sale was "of a specified article under its patent or other trade name" where there is no implied warranty of its fitness for any particular purpose.*

It is well settled that it does not follow necessarily from the fact that an article purchased has a trade name that it is bought thereunder or that the buyer does not rely on the skill or judgment of the seller.

The existence of an implied warranty is not negatived where the purchaser of an article, for a definite purpose rather than of a particular kind of merchandise, relies on the seller to supply him with something adapted to that end; the latter in that case does not escape liability by the recommendation and subsequent sale of an article having a trade name.

The implied warranty of the statute that goods sold for a known particular purpose "shall be reasonably fit for such purpose" measures the buyer's right of recovery and the seller's liability.

In the sale of wearing apparel, if the article could be worn by any normal person without harm, and injury is suffered by the purchaser only because of a supersensitive skin, there is no breach of the implied warranty of reasonable fitness of the article for personal wear.

On report. Action on the case for breach of warranty in which plaintiff seeks to recover damages from defendant company. Case remanded to Superior Court for the entry of judgment for the defendant. Case fully appears in the opinion.

William B. Mahoney,
Theodore Gonya, for plaintiff.
Robinson & Richardson,
John D. Leddy, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. In this action on the case for breach of warranty certified to the Law Court on report, the transcript of the evidence shows that on or about September 24, 1937, the plaintiff visited the defendant's department store and purchased from a clerk in the feminine hygiene department one or more pairs of dress shields used by women to protect their garments from armpit perspiration. She asked for white "Kleinert's Onandoff No. Four" shields and was told that they were not carrying that any longer in stock. The clerk then showed her a shield saying that "this new kind, recently marketed, was taking the place of that one (the shield asked for) . . . . They had been chemically treated so that they could be washed and ironed." In redirect examination, restating her conversation with the clerk, the plaintiff said: "I asked for the same type of shields I ordinarily wore, and was told that they were no longer stocking them, but they had one very similar to it that *they considered better* and naturally I took their word for it and bought it." In the following recross examination, she admitted that the clerk's explanation of why the new shields were *better* than the old style was "because they were boilable."

The shields purchased were marked and known to the trade as "Kleinert's Onandoff No. Four, Blue Label" shields and except that they were flesh colored and boilable were in all respects similar to the white shields which she had worn. The flesh color came from the use of rhodamine dye, an inert and harmless chemical. The new boilable quality was produced by introducing pure cotton flock into the rubber lining. The Blue Label shields were made by the largest manufacturer of dress shields in the country, had been on the market for at least four years, and the annual sales of the product ran into the millions.

Immediately after buying the shields, the plaintiff put them on and wore them for about two hours when her armpits became irritated and a removal of her clothing disclosed a highly inflamed condition of her underarm and body in that region corresponding in size and contour to the dress shield she had worn. The inflammation developed into dermatitis which responded slowly to treatment

and incapacitated the plaintiff for several weeks but finally subsided. The plaintiff again tried to use the Blue Label shields. In the latter part of October or first of November following her original purchase, she bought another pair at the defendant's store, attempted to wear them, and the results were the same. The record does not show that at the time of this second purchase the defendant's clerk made any statements whatsoever concerning the shields.

The plaintiff's family physician concedes that some people are susceptible to certain substances which the average person is not affected by, which is termed an allergy or idiosyncracy of the individual. And he says that a harmless substance applied to the skin of a person who has an allergy or idiosyncracy for it may produce inflammation and some individuals can not wear rubber next to their skin without having dermatitis due to the lack of evaporation of perspiration. Upon the hypothesis that the Blue Label shields involved in this action were free from deleterious substances, it was the physician's opinion that the plaintiff's dermatitis might be caused either by her allergy or the prevention of evaporation resulting from the use of the shields. Although he had not discovered in many years of professional attendance upon the plaintiff that she was allergic, he admitted that her actual condition in that regard could not be determined without an intradermal test which had not been made. The doctor also stated that, in seeking to determine the cause of the plaintiff's affliction, the extent of perspiration, lack of evaporation, heat and weather conditions, as also the tightness of the shield under the arm, were all factors to be considered. Although he attributes the plaintiff's injuries to the use of the Blue Label shields, he is unable to point out how or why that result came about.

A representative of the concern which manufactured the shields which the plaintiff purchased, and is its head chemist, explained at length the mechanical process used in making Blue Label dress shields, described the nature and amount of their chemical contents, their freedom from harmful or deleterious substances, and the rigid and repeated inspections to which they were subjected, and stated that all shields put upon the market were similar in every respect and no injury had ever been known to result from their use by the many women purchasing them throughout the country. No chemi-

cal analysis or other proof that the shields used by the plaintiff contained poisonous or harmful substances was introduced to contradict this evidence.

Such is the case reported. Obviously there was no express warranty made by the clerk who sold the shields. All that the plaintiff claims, when her testimony is carefully analyzed, is that when she asked for a white Kleinert shield she was told that they no longer stocked that but had one very similar to it "that they considered better." This, of course, was merely a matter of opinion and, at that, accompanied by an explanation that it was better because it was boilable. No expression of opinion merely, however strong, imports a warranty. R. S., Chap. 165, Sec. 12; *Bryant* v. *Crosby*, 40 Me., 9; *Rosenbush* v. *Learned*, 242 Mass., 297, 300, 136 N. E., 341; *Keenan* v. *Cherry & Webb*, 47 R. I., 125, 131 A., 309; 55 Corpus Juris 688 *et seq.* and cases cited.

The plaintiff claims, however, there is an implied warranty that the shields sold her should be reasonably fit for the purpose for which they were required under the Uniform Sales Act in force in Maine at the time of the sale as Clause 1 of Section 15, Chapter 165, R. S., which provides:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

We think the plaintiff's recovery in this action is governed by this clause of the act.

The weight of the evidence reported warrants the conclusion that the plaintiff, by implication, made known to the clerk in the defendant's feminine hygiene counter the particular purpose for which the dress shields she sought to purchase were required. It was made and adapted to one use and one use only. We can not assume that the clerk who waited on her was ignorant of this fact. *Weiner* v. *Schulte, Inc.*, 275 Mass., 379, 383, 176 N. E., 114; *Ireland* v. *Liggett Co.*, 243 Mass., 243, 137 N. E., 371; *Keenan* v. *Cherry & Webb*, supra; *Preist* v. *Last* (1903), 2 K. B., 148. That

the plaintiff relied on the clerk's skill or judgment is fully established. She so testified and neither fact nor circumstance contradicts her.

The plaintiff's right to recover on an implied warranty that the dress shields which she bought were reasonably fit for the particular purpose for which they were required as provided in Clause 1 of Section 15 of the Act can not be denied because the sale was "of a specified article under its patent or other trade name" where there is no implied warranty of its fitness for any particular purpose. Clause 4, Section 15, Chapter 165, R. S. It is well settled that it does not follow necessarily from the fact that an article purchased has a trade name that it is bought thereunder or that the buyer does not rely on the skill or judgment of the seller. Although here the plaintiff selected a brand of dress shields with which she was acquainted, she did not get it but accepted a different brand selected by the clerk. "The existence of an implied warranty 'is not negatived where the purchaser of an article, for a definite purpose rather than of a particular kind of merchandise, relies on the seller to supply him with something adapted to that end; the latter in that case does not escape liability by the recommendation and subsequent sale of an article having a trade name.'" *Weiner* v. *Schulte, Inc.*, supra, p. 383, 176 N. E., 116; *Ireland* v. *Liggett Co.*, supra, p. 247, 137 N. E., 371.

The implied warranty of the statute that goods sold for a known particular purpose "shall be reasonably fit for such purpose" (Clause 1, Section 15, Chapter 165, R. S.) measures the buyer's right of recovery and the seller's liability. It is accordingly held that in the sale of wearing apparel, if the article could be worn by any normal person without harm, and injury is suffered by the purchaser only because of a supersensitive skin, there is no breach of the implied warranty of reasonable fitness of the article for personal wear. *Flynn* v. *Bedell Co.*, 242 Mass., 450, 136 N. E., 252; *Bradt* v. *Hollaway*, 242 Mass., 446, 136 N. E., 254.

In the case at bar, the cause of the plaintiff's skin affliction on the evidence remains a matter of doubt and conjecture. It may be that she was allergic to the dress shield or one or more of its component parts, but that can not be known, her physician informs us, until an intradermal test is made. It is, of course, possible that the

shields contained deleterious and harmful chemicals or substances, but they were not analyzed and, if such be the fact, it has not been here established. We can not resort to a choice of possibilities. That is guesswork and not decision. *Titcomb* v. *Powers*, 108 Me., 347, 349, 80 A., 851; *Edwards* v. *Express Company*, 128 Me., 470, 148 A., 679; *Thibodeau* v. *Langlais*, 131 Me., 132, 159 A., 720.

The plaintiff, having failed to sustain the burden of proof of showing by competent evidence a breach of the implied warranty of fitness upon which she can only rely in this action, must be denied a recovery. The case will be remanded to the Superior Court where it originated for the entry of judgment for the defendant.

So ordered.

ROBERT M. GLAZER *vs.* BARNEY GROB.

BESSIE GLAZER *vs.* SAME.

GEORGE B. CHANDLER *vs.* SAME.

MORRIS GLAZER *vs.* SAME.

Kennebec. Opinion, January 28, 1939.

NEGLIGENCE. MOTOR VEHICLES.

The mere fact that a tire has been driven some distance and blows out does not without more render the owner or operator of the automobile liable. The unsafe condition of the tire must be established and that its condition was known to the owner or operator or could have been discovered by the exercise of reasonable care.

It is the rule that if the jury is instructed properly on a certain principle, any amplification or application of it is a matter in the control of the presiding Justice.

On motions for new trial and exceptions. Actions by the several plaintiffs tried together before a jury. Verdicts in each case for the defendant. Plaintiffs file motions for new trial and exceptions to

the refusal of presiding Justice to give certain requested instructions. Motions overruled. Exceptions overruled. Case fully appears in the opinion.

Berman & Berman (Lewiston, Maine), for plaintiffs.

Locke, Campbell & Reid, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. There are involved here four actions which were tried together. Robert Glazer, Bessie Glazer and George Chandler, gratuitous passengers in an automobile owned and driven by the defendant, sue to recover for personal injuries received when the car left the road on the Newburyport Turnpike in Massachusetts. Morris Glazer, the husband of Bessie, seeks to recover for loss of her consortium and for medical and other incidental expenses incurred in caring for her. The cases were tried under the Massachusetts rule which makes it incumbent on a passenger under such circumstances as these to prove gross negligence on the part of the defendant if a recovery is to be had; and it is conceded that such rule is applicable here.

There are a number of counts, to one of which specifications were asked for by the defendant. The allegations include excessive speed; excessive speed with a too sudden application of the brakes; unsafe, improper and worn tires, coupled with excessive speed and sudden stopping; excessive speed and lack of attention to his duties on the part of the defendant; worn tires, excessive speed resulting in a blowout of the left rear tire.

The trial resulted in verdicts for the defendant and the cases are now before this Court on the plaintiffs' general motions for a new trial and on exceptions to the refusal of the presiding Justice to give certain requested instructions.

THE MOTIONS

On July 6, 1937 the defendant was driving a 1935 four-door Chevrolet sedan easterly on the Newburyport Turnpike, a cement highway thirty feet in width. At the place of the accident the road is straight and runs through open country. The plaintiff, Chand-

ler, was seated in front with the defendant; the plaintiffs, Robert M. Glazer and Bessie Glazer, were on the rear seat. It is admitted that the left rear tire blew out and that the car left the highway and struck a pole standing on the easterly side about eight feet from the edge of the cement.

On the vital questions as to the speed of the car, whether or not it was pursuing a straight course, whether the defendant was paying proper attention to the operation of it, and whether or not the brakes were properly applied, the evidence is conflicting.

The plaintiffs offered evidence that there were tire marks on the cement for approximately two hundred feet. Chandler, Robert Glazer and Bessie Glazer testify that the car was travelling sixty miles an hour or faster, that the defendant had been asked to drive more slowly, that at the time of the accident the defendant had turned his head to speak to those on the back seat and that as he did so the automobile swerved to the right.

He denies that he was travelling over fifty miles an hour, that there were any protests from the other occupants of the car, or that he had turned his head to speak to those on the rear seat. His testimony is to the effect that the accident was caused by the unexpected blowing out of the left rear tire and that after that mishap he did his best to keep the car on the road.

It is common knowledge that defective tires are a frequent cause of automobile accidents. But the mere fact that a tire has been driven some distance and blows out does not without more render the owner or operator of the automobile liable. The unsafe condition of the tire must be established and that its condition was known to the owner or operator or could have been discovered by the exercise of reasonable care. *Delair* v. *McAdoo*, 324 Pa., 392, 188 A., 181.

The plaintiffs offered evidence that the defendant had had trouble with his tires and that some of them at least were not in good condition. On the other hand the defendant testified that he had had a punctured tire shortly before the accident but that the condition of the tires was good. In this he is corroborated by a Massachusetts highway police officer who examined the car after the accident.

There is evidence in the case of a statement made by the plaintiff,

Chandler, in the hospital as to the cause of the accident which is quite inconsistent with his testimony on this point at the trial.

The determination of the cause of the accident and whether or not the defendant was guilty of gross negligence as that phrase has been defined by the Massachusetts courts was, on the conflicting testimony offered at the trial, a question for the jury. Certainly it can not be said that as a matter of law the defendant is liable.

THE EXCEPTIONS

The presiding Justice read to the jury from the opinion in the case of *Altman* v. *Aronson*, 231 Mass., 588, 121 N. E., 505, which points out the distinction between negligence and gross negligence and then defines gross negligence in general terms. No exception was taken to the charge as given and the plaintiffs concede that it is correct. They asked, however, that certain additional instructions should be given. The three requested read as follows:

"1. Gross negligence may consist in the defendant being impatient of reasonable restraint and persistence in a palpably negligent course of conduct over an appreciable period of time culminating in the accident.

"2. 'Deliberate' inattention to the operation of an automobile is one of the more common elements of gross negligence.

"3. To drive a motor vehicle upon the public ways of the Commonwealth of Massachusetts at a speed which would endanger the life or safety of its occupants, might be found to be gross negligence, even in the absence of other unfavorable conditions."

To the refusal to give these instructions, exceptions were taken.

It is the rule that if the jury is instructed properly on a certain principle, any amplification or application of it is a matter in the control of the presiding Justice. *State* v. *Smith*, 65 Me., 257, 269; *Bunker* v. *Gouldsboro*, 81 Me., 188, 196, 16 A., 543. Certainly there was here no abuse of such discretion. On the contrary the present case indicates the wisdom of confiding such power to the judge who sits at the trial; for the different counts in the several declarations set forth a number of different acts and omissions

which it is claimed constitute negligence. There being evidence touching these, the presiding Justice may well have thought that to give the requested instructions would have unduly emphasized some particular state of facts. His judgment on that point is not reviewable here.

Motions overruled.
Exceptions overruled.

STATE OF MAINE *vs.* FRASER SHANNON.

Somerset. Opinion, January 30, 1939.

FORMER JEOPARDY. PERJURY. CRIMINAL PLEADINGS.

It is the supreme law of the land that no person shall be twice put in jeopardy for the same offense, and if the respondent has already been tried and acquitted of the offense now charged in the indictment pending against him, he should not be compelled to again stand trial and be brought into danger of punishment for that offense.

The test to be applied is not merely whether the same evidence supports both charges, or whether more proof might come in on a second trial, but whether the two offenses are essentially independent and hence distinct.

To constitute a bar to the pending indictment against the respondent, it must appear that the former acquittal was for the same offense in law and in fact.

Whether the offenses are the same or different is a question of law.

The State can not divide a single offense into several parts according to time or conduct and base separate prosecutions upon and impose separate punishments for the various divisions.

A prosecution for any part of a single crime bars any further prosecution based on the whole or a part of that crime.

Perjury is defined by statute, R. S., Chap. 133, *Sec.* 1, *and except as the statute has enlarged the scope of perjury by including therein corrupt and wilful false oaths and affirmations outside the common-law definition of the crime, it is declaratory, of the common law and must be construed in harmony therewith and as not making any innovation therein which it does not clearly express.*

It is settled law that one offense only can be charged in one count of an in-

dictment, but when several acts relate to the same transaction and together constitute but one offense they may be charged in the same count.

In indictments for perjury, it is held that any and all false statements made by a witness under oath may be charged in one count if the statements were given under one oath and in one proceeding.

It is not a valid objection to an indictment that it embraces in a single count all the particulars in which the defendant is alleged to have sworn falsely where the assignments relate to the same transaction. And one good assignment of perjury will support a general verdict of guilty, although other assignments are defective or not sustained by proof.

The rationale of the rule laid down seems to be that false statements relating to the same transaction, whether one or more, if made under one oath and in one judicial proceeding constitute only one perjury.

When time is not an essential element in the constitution of an offense, it is not necessary to prove that it was committed on the day alleged.

Having elected to prosecute the respondent for a part of his alleged perjury, the State can not now divide the offense with which he is charged "into several parts according to time or conduct for the purpose of basing separate prosecutions upon the various divisions."

On agreed statement of facts. Respondent was indicted at September Term, 1938, of the Superior Court in and for Somerset County, for the crime of perjury. Respondent waived reading of the indictment and filed a special plea of *autrefois acquit*, the case being reported on agreed statement of facts with stipulation. The respondent's plea of *autrefois acquit* sustained and case remanded to Superior Court for entry of judgment for the respondent. Case fully appears in the opinion.

Clayton E. Eames, County Attorney, for State.

Fred H. Lancaster,

William Folsom Merrill,

Lloyd H. Stitham, for respondent.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. At the September Term, 1938, of the Superior Court in and for Somerset County, the grand jury having returned an indictment for perjury against the respondent Fraser Shan-

non, he waived reading of the indictment, filed a special plea of *autrefois acquit*, and the case was reported to the Law Court on an agreed statement of facts, with stipulation that if the respondent's special plea is disallowed he shall plead over and stand trial.

It appears that at the January Term, 1934, of this Superior Court the respondent Fraser Shannon, as plaintiff in a civil action against one George R. Dow, recovered a substantial verdict for damages for injuries received, as the agreed statement admits, through the negligence of that defendant. The transcript of evidence in that case, made available for consideration here by stipulation, shows that the real defense relied upon was the plaintiff's contributory negligence. The trial began on January 17 and continued without interruption through the following eighteenth and nineteenth days of the month. The respondent testified in both his direct and cross-examinations on the first day of the trial and in rebuttal on the last day.

At the January Term, 1937, of the same court an indictment for perjury in this civil trial was returned against the respondent upon which he was tried and found guilty. Exceptions to the Law Court, however, were sustained and a new trial granted. At the May Term next following, the respondent was again tried on this indictment and there, by direction of the Justice presiding, he was acquitted and discharged.

And now in an indictment returned to the same Superior Court at the September Term, 1938, Fraser Shannon is again charged with having committed perjury in the trial of his civil action against George R. Dow and has interposed a plea of former jeopardy.

It is the supreme law of the land that no person shall be twice put in jeopardy for the same offense. If the respondent has already been tried and acquitted of the offense now charged in the indictment pending against him, he should not be compelled to again stand trial and be brought into danger of punishment for that offense. U. S. Const., Fifth Amend.; Const. of Maine, Art. I, Sec. 8. The test to be applied is not merely whether the same evidence supports both charges, or whether more proof might come in on a second trial, but whether the two offenses are essentially independent and hence distinct. *State* v. *Beaudette*, 122 Me., 44, 118 A.,

719. To constitute a bar to the pending indictment against the respondent, it must appear that the former acquittal was for the same offense in law and in fact. *State* v. *Littlefield*, 70 Me., 452, 457; *Com.* v. *Roby*, 12 Pick. (Mass.), 496; *Burton* v. *U. S.*, 202 U. S., 344, 26 S. Ct., 688, 698. Whether the offenses are the same or different is a question of law. *State* v. *Jellison*, 104 Me., 281, 283, 71 A., 716. They are the same if that now charged against the respondent is not independent and distinct, but in fact and in law only a part of the offense of which he was acquitted. It is elementary that the State can not divide a single offense into several parts according to time or conduct and base separate prosecutions upon and impose separate punishments for the various divisions. A prosecution for any part of a single crime bars any further prosecution based on the whole or a part of that crime. *Peo.* v. *Stephens*, 79 Cal., 428, 21 P., 856; *State* v. *Sampson*, 157 Iowa, 257, 138 N. W., 473; *State* v. *Cotner*, 87 Kan., 864, 866, 127 P. 1; *Patterson* v. *State*, 96 Ohio St., 90, 117 N. E., 169; 15 Am. Jur. 58; 16 Corpus Juris, 270 and cases cited.

In this state, perjury is now defined by statute. R. S., Chap. 133, Sec. 1. And it reads:

> "Whoever, when required to tell the truth on oath or affirmation lawfully administered, wilfully and corruptly swears or affirms falsely to a material matter, in a proceeding before any court, tribunal or officer created by law, or in relation to which an oath or affirmation is authorized by law, is guilty of perjury;"

Except as the statute has enlarged the scope of perjury by including therein corrupt and wilful false oaths and affirmations outside the common-law definition of the crime, it is declaratory, we think, of the common law and must be construed in harmony therewith and as not making any innovation therein which it does not clearly express. *Wing* v. *Hussey*, 71 Me., 185, 188; End. Int. Statutes, Sec. 127; Bishop Stat. Crimes (2nd Ed.), Sec. 144.

In the indictment for perjury upon which the respondent Fraser Shannon was tried and finally acquitted, omitting details not here of controlling importance, it was charged that in the trial of his civil action on the nineteenth day of January, 1934, he offered him-

self as a witness and on oath lawfully administered to him, upon the issue then and there joined of whether he was injured through the negligence of the defendant in allowing gunpowder to be stored in his public garage and used to load a cannon or iron tube which exploded and severely injured Shannon while he was in the garage for the purpose of storing his automobile, and also whether Shannon himself was in the exercise of due and reasonable care, the material question being, as averred, whether Shannon participated in the Fourth of July celebration then going on at the garage "by then and there assisting in loading the aforesaid cannon or iron tube with powder and explosives," the respondent upon his oath, feloniously, knowingly, falsely, wilfully and corruptly,

"among other things did swear and testify as follows:
'Q. Did you take part in the loading of the cannon?
A. No, I didn't.
Q. Did you have any waste in your hands to load the cannon with?
A. No, I didn't.
Q. And you again say to the jury that you took no part in the celebration (Meaning the Fourth of July celebration held at said garage on the fourth day of July, A. D. 1932)?
A. No, I did not.' "

And it was averred:

"all of which answers to the three aforesaid questions were material to the issue."

And that in truth and fact the respondent Shannon at the time and place alleged did

"take part in the loading of the cannon and did have waste in his hands to load the cannon with and did take part in the celebration as aforesaid."

And in the report, by reference, it is made to appear that the testimony alleged to be false and relied upon in the assignment of perjury in that indictment was all given by the respondent in his rebuttal testimony on the last day of the trial of his civil action.

In the present indictment, attempt is made to charge a separate

and distinct perjury growing out of the testimony of the respondent given in his direct and cross examination in the same proceeding but on the first day of the trial. The general averments of this indictment are the same as those in the one upon which the respondent was acquitted. The proceeding in which perjury is charged, the court before which the trial was held, the due administration of the oath, and the claim of the respondent as plaintiff therein as alleged in his declaration are identical, the issue being defined with more particularity but in the end averred to be the contributory negligence of the respondent. The framer of this indictment makes multiple averments of alleged material questions and matters covering facts and circumstances occurring before and at the time the so-called cannon exploded and the respondent was injured, all tending to prove his contributory negligence or bearing upon his credibility. And it is alleged that the respondent, upon his oath, feloniously, knowingly, falsely, wilfully and corruptly, among other things, did swear and testify as then set forth in a series of questions and answers recited in detail and verbatim, the substance of which is that the respondent did not know or learn in the afternoon of July 3, 1932, that there was going to be a celebration at the garage, took no ride in the late evening with individuals named, had nothing to do with loading the cannon or firing it, did not know when he drove his car into the garage that there was any celebration taking place except that out front they were firing firecrackers, heard only one heavy explosion, did not assist in constructing a bomb to be used in the celebration, saw neither firecrackers nor powder on the floor of the garage before the explosion, and did not know or have any reason to know that there was any there. And the further averment is that all of these answers by the respondent were false and known by him to be so, the contrary was true, and his false statements were material to the issue of his contributory negligence in bringing about his injury for which, in the civil action, he had a recovery.

A reading of the record leaves no doubt that the perjury charged against the respondent in each of the indictments here under consideration consists of testimony given in one trial, under one oath, at different times but all relating directly or indirectly to his contributory negligence in the accident upon which his civil ac-

tion was based. The question presented here is whether one who has taken a lawful oath as a witness in a trial and as such witness has wilfully and corruptly made more than one false statement as to one or more matters material to the issue can be held to have more than once committed the crime of perjury.

It is settled law that one offense only can be charged in one count of an indictment, but when several acts relate to the same transaction and together constitute but one offense they may be charged in the same count. *State* v. *Trowbridge*, 112 Me., 16, 18, 90 A., 494; *State* v. *Nelson*, 29 Me., 329. In indictments for perjury, it is held, without dissent we believe, that any and all false statements made by a witness under oath may be charged in one count if the statements were given under one oath and in one proceeding. It is not a valid objection to an indictment that it embraces in a single count all the particulars in which the defendant is alleged to have sworn falsely where the assignments relate to the same transaction. And one good assignment of perjury will support a general verdict of guilty, although other assignments are defective or not sustained by proof. *Com.* v. *Johns*, 6 Gray (Mass.), 274; *Com.* v. *McLaughlin*, 122 Mass., 449; *Hoffman* v. *Judge*, 150 Mich., 58, 113 N. W., 584; *State* v. *Gordon*, 196 Mo., 185, 95 S. W., 420; *State* v. *Blaisdell*, 59 N. H., 328; *Harris* v. *Peo.*, 64 N. Y., 148; *State* v. *Bordeaux*, 93 N. C., 560; *Dunn* v. *State*, 15 Okla. Cr. 245, 176 Pac., 86; *Cover* v. *Com.* (Pa.), 8 A., 196; *State* v. *Anderson*, 35 Utah, 496, 503, 101 P., 385; *State* v. *Bishop*, 1 D. Chip. (Vt.), 120; *State* v. *Smith*, 63 Vt., 201, 22 A., 604; 16 Encyc. Pl. & Pr., 316 n.1; 2 Wharton's Crim. Law (11th Ed.), Sec. 1565, 1567; 31 Corpus Juris 763 n. 27b. The rationale of the rule laid down in these authorities seems to be that false statements relating to the same transaction, whether one or more, if made under one oath and in one judicial proceeding constitute only one perjury. This is the view taken in other jurisdictions.

In the early case of *State* v. *Bishop*, 1 D. Chip. (Vt.), 120 *supra*, the respondent was charged in an indictment containing only one count with perjury in his testimony relating to three separate and independent matters. That Court said:

> "There can be no foundation for the first exception, that the respondent is in one count in the indictment, charged with

perjury, in swearing falsely in relation to several separate and distinct facts. This is not a charge of separate and distinct crimes. If it is, there might be so many different prosecutions commenced, and so many distinct punishments inflicted in consequence of a single oath, and false swearing under that oath, which would be new, and even absurd."

In *State* v. *Anderson*, 35 Utah, 496, 503, 101 P., 385, *supra*, in an information for perjury it was alleged that the respondent in a civil action there referred to made numerous false statements under oath. The respondent demurred to the information on the ground that more than one offense was charged therein, and it was held:

"that the several assignments contained in the information consist of certain alleged successive statements made by defendant while testifying as a witness, and are so related to the one question which was the subject-matter of inquiry in the action in which the testimony was given, and were so linked and blended together in point of time, as to constitute but one act or transaction, and therefore constitute but one offense."

In *Black* v. *State*, 13 Ga. App., 541, 79 S. E., 173, the precise question raised here was considered. The respondent there was indicted for perjury and filed a plea of former jeopardy. It is apparent from a reading of the case that the respondent there was first indicted, tried and acquitted upon assignments of perjury directed to part only of his testimony given in a civil trial. In the second indictment he was charged with perjury in making other false statements in the course of the same trial. That Court there said in part:

"The question is presented whether one who has taken a lawful oath as a witness in a judicial investigation, and who, as such witness, knowingly and wilfully makes more than one absolutely false statement as to more than one matter material to the issue, can more than once commit the offense of perjury in the same investigation and under the sanctity of the same oath. We are of the opinion that the identity of the proceeding and of the oath administered the witness excludes the possibility that the witness is guilty of more than one perjury in

> the particular investigation. There is but one violation of the oath. . . . The offense of perjury is complete when, in a judicial proceeding, a witness (after the administration of the oath and his voluntary subjection to its binding authority) has wilfully, knowingly, absolutely, and falsely testified as to one material matter. Subsequent falsehoods under the same oath do not make new perjuries, but only exhibit additional ways in which the perjury was committed;"

We have not overlooked the point made that the time laid in the indictment upon which the respondent was tried and acquitted was January 19, 1934, the last day of the trial of his civil action, when he took the stand in rebuttal, and that the time of giving the testimony upon which the pending indictment is based is alleged as January 17, 1934, the first day of the same trial, when his direct and cross-examination took place. As already appears, there was but one trial and one oath, and the testimony covered by both indictments was material to the same issue. It was necessary to allege in each indictment a day certain when the offense charged was committed, but time was not an essential element in the constitution of the offense and it was not necessary to prove that it was committed on the day alleged. *State* v. *Hanson*, 39 Me., 337, 340; *State* v. *Fenlason*, 79 Me., 117, 8 A., 459. The State, in the first indictment, could have assigned in a single count each and every false statement which the respondent made in the entire course of the civil trial and alleged a single day certain with a continuando as the time of the commission of the alleged crime. If it had done so, proof of any one assignment of perjury would have warranted a conviction, but only one penalty could have been imposed. One crime only would have been charged. *State* v. *Nelson*, 29 Me., 329, 335. See cases already cited. Having elected to prosecute the respondent for a part of his alleged perjury, the State can not now divide the offense with which he is charged "into several parts according to time or conduct for the purpose of basing separate prosecutions upon the various divisions."

For the reasons stated, the respondent's plea of *autrefois aquit* must be sustained and the case remanded to the Superior Court where it originated for the entry of judgment for the respondent.

So ordered.

MAINE UNEMPLOYMENT COMPENSATION COMMISSION

vs.

MAINE SAVINGS BANK.

Cumberland. Opinion, January 30, 1939.

BANKS AND BANKING. MASTER AND SERVANT.

MAINE UNEMPLOYMENT COMPENSATION COMMISSION.

The legislature intended to prohibit the holding by a savings bank of real estate beyond what should be sufficient for banking rooms as that term is understood by bankers; except that, within limits, real estate acquired by the foreclosure of mortgages thereon, or upon judgments to secure debts are authorized holdings. R. S., Chap. 27, Sec. 30, as amended by Sec. 5, Chap. 222, P. L. 1931.

A savings bank may have title as mortgagee to parcels of real estate, and cause the same to ripen into absolute title, as the exigencies of its various mortgagors may dictate.

Contracting for repairs, improvements and alterations to such parcels of real estate as are acquired by a savings bank is not contracting "for any work which is part of its usual trade, occupation or business" and expenditures for these purposes are merely incidental to the banking business as contemplated by the authors of the Maine Unemployment Compensation Law.

On report. This is an action of debt to recover a contribution alleged to be due from the defendant with respect to wages payable for employment during the first quarter of the year 1937, under the provisions of the Maine Unemployment Compensation Law. Judgment for defendant. Case fully appears in the opinion.

John S. S. Fessenden, Assistant Attorney General, for plaintiff.

Verrill, Hale, Dana & Walker, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

BARNES, J. This is an action to recover a contribution alleged to be due from the defendant with respect to wages payable for em-

ployment during the first quarter of the year 1937, under the provisions of our Unemployment Compensation Law, P. L. of Maine, 1935, Chap. 192.

It comes before this Court on an agreed statement of facts, wherein we note that defendant is and has been since 1859 operating under and governed by the law as applicable to all savings banks in this state; that, for the first calendar quarter of 1937 defendant reported and paid the Commission, as its net contribution, the sum of $1857.09; that in the course of its banking business it has become the owner of, or has taken possession of, a number of parcels of real estate; in most cases by virtue of foreclosure of mortgages taken to secure loans, the "one or two exceptions" being where a release deed was accepted, obviating the expenditure consequent on foreclosure; that in the period under survey defendant was operating or managing "approximately one hundred forty parcels of real estate," repairs and maintenance being superintended by one servant, carried on defendant's regular payroll, devoting approximately one-half of his time to this work, and assisted by another servant of the bank, also on the regular payroll, "who spends a portion of his time collecting rents and interviewing tenants," the wages and salaries of both being carried on the payrolls of defendant, reported as above, and on which contributions were paid; that defendant provided for such upkeep as it deemed requisite on contracts with individuals, partnerships or corporations engaged in one or more of the building trades, in a few cases after competitive bids, but in most paying the contractor on the basis of labor and materials furnished under the contract; that in no case did the defendant exercise any control over the employment or discharge of laborers, or supervision over such laborers; that the charge for such labor was included in the price fixed in the contract together with contractor's profit, a sum greater than actual wages paid; that, during said quarter, $2944.76 was paid to workers by the individuals, partnerships or corporations, on contracts with defendant for the repair, improvement or alteration of defendant's real estate holdings, the contribution claimed as accruing and payable on that sum, by agreement amounting to $53.00, and not paid by defendant to plaintiff.

Suit is authorized by Section 14 (b) of the Act.

The agreed statement further provides, and shows:

"None of the individuals, partnerships or corporations engaged by the defendant to repair, alter, or improve the defendant's real estate were 'employers' as defined in the Unemployment Compensation Law.

"On the nineteenth day of August, 1937, due notice of the alleged contributions due the plaintiff was given to defendant by the plaintiff and payment of said contributions duly demanded.

"It is agreed that the foregoing statement of facts does not involve and should not be applied to the determination of the status of an individual who deals directly with the defendant either by contract or otherwise in the performance of individual services actually performed by himself alone and without authority to engage persons to assist him in the performance of such services."

Other statements of fact, as we view the case, may not be pertinent to decision.

Plaintiff contends that the $53.00 computed as above is due, together with interest, from April 1, 1937; defendant contesting the claim as not within the law providing for contributions under the Unemployment Compensation Act.

To be more explicit, defendant contends that contributions accrue and become payable to the Compensation Commission, in its case, only when it, as an employing unit "contracts with or has under it any contractor or sub-contractor for any work which is part of its usual trade, occupation, profession, or business," (Quotation of the portion of Section 19e of the Unemployment Commission Law, applicable here).

It is agreed that the sum sued for is not due, unless it accrues within the meaning of the temporal clause quoted above.

The learned counsel for plaintiff reveals the simple nature of this controversy by suggesting that the decision of the Court must turn upon this question: "Is the repair, alteration, maintenance and improvement of (its) real estate holdings a part of the usual trade, occupation, profession or business of the defendant?"

Defendant was incorporated under Chap. 328, P. and S. Laws of 1859, "with all the powers and privileges conferred upon similar institutions by the laws of said State, and subject to all the liabilities and restrictions thereof."

It took the powers and privileges granted to it under the statutes then in force, Chapters 46 and 47, Statutes of 1857. It has continued, in trade, occupation, profession or business to the present time, changed only in its name.

It is a creature of statute, with strictly limited powers, its investments materially restricted and its operations subject to the supervision of the state bank Commissioner.

It operates under general statutory provisions as follows:

> "Savings banks and institutions for savings, incorporated under the authority of the state, may exercise the powers and shall be governed by the rules and be subject to the duties, liabilities, and provisions in their charters, in the following sections, and in the general laws relating to corporations, unless otherwise specially provided."
>
> R. S., Chap. 57, Sec. 13.

In the field of investment in mortgage loans on real estate savings banks are limited to investment:

> "In notes or bonds secured by first mortgages of real estate in Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut and Vermont, to an amount not exceeding 60% of the market value of such real estate, or in notes or bonds secured by first mortgages which the Federal Housing Administrator has insured or has made a commitment to insure. No bank shall have more than 60% of its deposits invested in such mortgages."

R. S., Chap. 57, Sec. 27—XIV, as amended by Chap. 101, Sec. 1, P. L. 1937.

Also:

> "A savings bank may hold real estate in the cities or towns in which such bank or any branches thereof are located, to a total amount not exceeding five per cent of its deposits or to an amount not exceeding its reserve fund; but these limita-

tions shall not apply to real estate acquired by the foreclosure of mortgages thereon, or upon judgments for debts or in settlements to secure debts."

R. S., Chap. 27, Sec. 30, as amended by Sec. 5, Chap. 222, P. L. 1931.

It seems clear from the statutes here quoted, that the legislature intended to prohibit the holding by a savings bank of real estate beyond what should be sufficient for banking rooms as that term is understood by bankers; except that, within limits, real estate acquired by the foreclosure of mortgages thereon, or upon judgments to secure debts are authorized holdings.

Not that there is authority in our legislation for a savings bank to hold real estate, other than its banking rooms indefinitely.

We know of no law authorizing a savings bank to take up the business of a real estate corporation.

But it may have title as mortgagee to parcels of real estate, and cause the same to ripen into absolute title, as the exigencies of its various mortgagors may dictate.

It is common knowledge that mortgage indebtedness on real estate, taken ten years ago at less than the maximum of 60% of the valuation of the property, even in the rare cases where interest has been paid annually may in general be said to exceed the market value of the security today.

And in great areas of Maine, at this writing, the factors setting up market value are definitely absent.

A slump, all but catastrophic in every state of the union, and terrific in Maine, followed by depression, recession and their spawn, in the fountains of investment in the business of banking, has justified the belief which we entertain that no legislature in our history ever intended that the business of a savings bank should include the real estate business.

It follows that contracting for "repairs, improvements and alterations to such parcels of real estate," quoting from the statement of facts, as any man, even the most prudent, may frequently find himself bound to do, in order to make the loss in any ten lean years less formidable, is not contracting "for any work which is part of its usual trade, occupation, or business," when done by the Maine Savings Bank.

Expenditure on the part of the defendant here is merely incidental to the banking business, the business of the defendant, as contemplated by the authors of the Maine Unemployment Compensation Law.

Batchelder & Snyder Co. v. *Saco Savings Bank*, 108 Me., 89, 79 A., 13; *Gardiner Trust Co.* v. *Augusta Trust Company*, 134 Me., 191, 182 A., 685.

No cases in other jurisdictions have been cited, nor do we find any that will rule here.

We conclude that it is the duty of defendant to keep its real estate, to which it has acquired title in the course of its business, and strictly in accordance with law, in physical condition to bring fair value on sale, as incidental to its distinctive business of receiving the money of its depositors and letting it out on proper investments, just as expenditure in purchasing and maintaining costly vaults is incidental to the business of a savings bank, although it is not the business of such a bank to keep great sums of money in storage.

Judgment for defendant.

FRANK M. COFFEY, EXECUTOR OF THE ESTATE OF

MARY GERTRUDE COFFEY

vs.

HAROLD N. GAYTON, HAZEL E. BICKNELL,

THE TRAVELERS INSURANCE COMPANY,

MERCHANTS MUTUAL CASUALTY COMPANY.

(DECIDING THE ABOVE AND TWO OTHER CASES)

Androscoggin. Opinion, February 8, 1939.

INSURANCE. PRINCIPAL AND AGENT. MOTOR VEHICLES.

When a case is reported without reservation on bills, amendments, answers, and other pleadings, objections made to amendments to the bills must be held to have been waived.

When the evidence shows that a provision in a liability policy was omitted through mutual mistake, the policy shall be treated as if the provision were a part of it.

That an agent may act for two principals at the same time so as to render them both liable is an exception to the ordinary rule that one can not be the servant of two masters at the same time.

The president of a corporation engaged in the garage business, to which liability policy was issued covering liability of the president, was not covered by policy merely because he may have been exposed to operating hazard of garage business at time of accident, where reference in policy to operating hazard related to method for assessing premium.

The liability of the president of a corporation, engaged in the garage business, for collision occurring while he was driving automobile for another person's benefit was not within coverage of liability policy issued to the corporation covering liability of its president while operating automobile in charge of garage for purpose in connection with its business.

On report. A bill in equity to reach and apply insurance money from two policies against the liabilities of the judgment debtors. Cases remanded to sitting Justice for decrees dismissing the bills as to Merchant's Mutual Casualty Company by sustaining them as to the other defendants for the purpose of reaching and applying the proceeds of the insurance policy issued by the Travelers Insurance Company to the payment of the judgments recovered by the plaintiff to the extent of the limits set forth in such policy. So ordered. Cases fully appear in the opinion.

Berman & Berman (Lewiston, Maine), for plaintiffs.

Fred H. Lancaster,

John J. Connor, Jr.,

Clifford & Clifford,

Frank T. Powers, for defendants.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. Six actions at law, growing out of an automobile collision, were brought, three against Hazel E. Bicknell, and three against Harold N. Gayton. Two were prosecuted by Frank M. Coffey as executor of the estate of his wife, Mary Gertrude Coffey, to recover for her conscious pain and suffering, two were brought

by Frank M. Coffey to recover for expenses in treating her injuries and for loss of her services, two more by him individually to recover for his own injuries. The plaintiff recovered a judgment in each case and executions were issued in the first two for $10,317.61 against Hazel E. Bicknell, and $10,317.86 against Harold N. Gayton; in the second two for $6158.55 and $6158.15; and in the third two for $2086.52 and $2082.79. Miss Bicknell, the owner of the car involved in the accident, was insured in the Travelers Insurance Company. Gayton, who was driving her car at the time of the accident, was president and manager of the Gayton-Crowley Chevrolet, Inc., which did an automobile sales and garage business. This company had a policy in the Merchants Mutual Casualty Company which insured the corporation, and the plaintiff claims that Gayton was covered personally for his liability growing out of the accident. Gayton, since he was driving the automobile with Miss Bicknell's permission, was covered by her policy but the limits of it were not sufficient to permit payment of the amount to which the plaintiff was entitled on all the judgments. This bill in equity was filed in accordance with the provisions of R. S. 1930, Chap. 60, Secs. 177-180 to reach and apply the insurance money from both policies against the liabilities of the judgment debtors. It deals only with the cases of Frank M. Coffey, Executor, against Miss Bicknell and Mr. Gayton. The bill recites that judgments were recovered in the other two groups of actions and that the amount to which the plaintiff is entitled on all the judgments is in excess of the limits in the policy of the Travelers Insurance Company. The bill prays that both insurance companies may be ordered to pay the amount recovered by Frank M. Coffey, Executor, in accordance with the proportionate liability of each company. Similar bills in equity have been filed to reach and apply the insurance money to the payment of the judgments in the other two groups of cases, and all three causes are reported to this Court under a stipulation that the bill, answers and other pleadings made a part of the record in the case of Frank M. Coffey, as Executor, are typical of the bills, answers and pleadings in the other two.

The defendant, Gayton, on October 20, 1935 was the president and manager of the Gayton-Crowley Chevrolet, Inc., a corporation doing a sales and garage business in Lewiston and having the

agency for Chevrolet automobiles. It sold not only new cars and trucks but used cars of various makes. In connection with his business Gayton had planned to drive to Skowhegan on the morning of Sunday, October 20th, to interview a prospective customer. He stopped at the place of business of the Lewiston Buick Company and talked with a friend, Carl Curtis, who told him that he was going to Norridgewock on business in his car. As Norridgewock and Skowhegan are located near each other, the two men decided to go together in one of Curtis' cars. Gayton drove his car back to his own garage; Curtis picked him up there; and they then proceeded on their way to Skowhegan. In the neighborhood of Greene an automobile driven by the defendant, Miss Bicknell, passed them. Mr. Curtis who recognized her overtook her, asked her where she was going, and invited her to ride with them. Leaving her own car at Jerry's Garage in Monmouth she joined the two men. The three then drove to Norridgewock and to Skowhegan where Gayton interviewed his prospective customer. Late in the afternoon they all started back to Lewiston. It was dark when they arrived at Jerry's Garage in Monmouth where Miss Bicknell's car had been left. According to the testimony of Mr. Curtis, Miss Bicknell said that she hated to drive after dark in the traffic on that road, and it was decided that Gayton would drive her car back to Lewiston and that they would meet at Gayton's garage there. Gayton testifies that he suggested driving her car back because he was in a hurry to get to the office. After he had gone about two miles he had a collision with the automobile driven by Coffey. As a result of that collision the actions at law previously referred to were brought against Miss Bicknell, the owner of the automobile, and against Gayton who was driving. Miss Bicknell's liability was based on the fact that Gayton acted as her agent in driving her car.

There seems to be no question as to the liability of the Travelers Insurance Company under the policy issued by it. It covered Miss Bicknell as owner of the car and Gayton who was driving it with her permission. The problem here is whether the policy of the Merchants Mutual Casualty Company covered the liability of Gayton. If it did we presume the plaintiff will collect the full amount of his judgments instead of a part, and the sum which the Travelers Insurance Company will have to pay will be substantially

reduced because of the apportionment of the loss between the two insurers based on the limits set in their respective policies.

Counsel for the Merchants Mutual Casualty Company objected to amendments to the bills offered by the plaintiff. The Court permitted the amendments. As the cases are reported without reservation on bills, amendments, answers, and other pleadings the objections must be held to have been waived.

The Merchants Mutual Casualty Company on May 26, 1934 had issued a liability policy insuring Gayton-Crowley Chevrolet, Inc. This policy expired May 26, 1935. It contained an endorsement, referred to as Endorsement No. 41, which on the conditions therein set out insured Gayton individually. Prior to the expiration of the policy there were negotiations between the insured and the authorized agent of the insurer for a renewal of it. We are satisfied from the evidence that it was the intention of both parties that a new policy should be issued on the same terms and conditions. June 2, 1935 the new policy was executed to expire May 26, 1936. Through some error it did not contain Endorsement No. 41. The plaintiff's bills as amended set forth these facts and pray that the policy may be reformed or construed as if the endorsement were a part of it. As the evidence shows that the provision in question was omitted through mutual mistake, we shall treat the policy as if the endorsement were a part of it. *Tarbox* v. *Tarbox*, 111 Me., 374, 89 A., 194; *National Traders' Bank* v. *Ocean Insurance Co.*, 62 Me., 519; *Inter-Southern L. Ins. Co.* v. *Holzhauer*, 177 Ark., 927, 9 S. W., 2d, 26; Note 66 A. L. R., 777; Note 76 A. L. R., 1220 *et seq.*

We have therefore two questions before us, first the construction of the terms of the policy assuming Endorsement No. 41 to be a part of it, secondly we must determine whether Mr. Gayton was covered by the terms of the policy as so construed.

The essential part of the coverage clause of the policy reads as follows:

> "THIS POLICY INSURES AGAINST SUCH LOSSES (defined in clauses one and two above) when sustained by reason of the conduct of the Automobile Sales Agency, Public Garage, or Automobile Service Station located as specified in said Warranties; including the ownership, maintenance and operation of any style, type or make of automobile, tractor, or trailer,

for any and all purposes in connection with such business including pleasure use."

Endorsement No. 41 which relates to Gayton's coverage must be construed in connection with this. It reads in part as follows:

"In consideration of the additional premium of $ NIL this policy is extended to cover the legal liability as defined therein of H N GAYTON-PRESS while any automobile owned by or in charge of the named garage, other than an automobile owned by the person named below or by member of his family, is being operated by said named person (or by any person when accompanied by him) for the purposes described in the policy and for private pleasure purposes."

It is to be noted that this policy is something more than the ordinary policy covering liability for accidents in the operation of automobiles. This covers liability incurred in the general conduct of the business, included in which is that incurred by the ownership, maintenance and operation of automobiles, etc., for any purpose in connection with the business. We are not here concerned with the provision relating to pleasure use. In so far as Endorsement No. 41 has any application to the present case, it covers the legal liability of Mr. Gayton individually while operating an automobile in charge of the named garage for any purpose in connection with its business.

We can not agree with the contention of counsel for the plaintiff that Gayton was covered by the policy merely because at the time of the accident he may have been exposed to an operating hazard of the business. The policy does not so state. The provision of the policy on this point relates not to coverage but to the method for assessing the amount of the premium. It provides merely that the premiums on the policy shall be based upon the entire remuneration of all employees, and that the salary of officers whose duties expose them to any operating hazard of the business shall be included at a fixed amount of $2000.00 each per person.

The questions in this case to be determined are, first was the Bicknell car at the time of the accident in charge of Gayton-Crowley Chevrolet, Inc., and secondly was it then being operated for any purpose in connection with the business of that company.

Both of these questions must be answered in the negative.

The judgments against Miss Bicknell are based on the assumption that Gayton was acting as her agent at the time of the accident. Counsel for the plaintiff insist that this is not inconsistent with his also being the agent of his company; and they point out that an agent may act for two principals at the same time so as to render them both liable. *Koontz* v. *Messer*, 320 Pa., 487, 181 A., 792; Restatement, Agency (1933), Sec. 226. But this is an exception to the ordinary rule which is that one can not be the servant of two masters at the same time. Restatement, Agency (1933), Sec. 226, *supra*. An excellent discussion of this general problem will be found in *Higgins* v. *The Western Union Telegraph Company*, 156 N. Y., 75, 50 N. E., 500, 66 Am. St. Rep., 541. The question before us is was Gayton at the time of the accident acting as the agent of his company.

The automobile of Miss Bicknell was in no sense in charge of the Gayton-Crowley Chevrolet, Inc., unless the control of it by Gayton was likewise the control of the company of which he was president; and accordingly if he was not in the words of the policy operating it for the purposes described in the policy, namely the business of the company, the automobile was not in its charge.

Reduced to its simplest terms the plaintiff's contention seems to be that because Gayton was on the company's business when he went to Skowhegan, and because he was on his way home at the time of the accident in Miss Bicknell's car, therefore he was using Miss Bicknell's car on the business of his company.

We shall assume for the purposes of this case that in going with Curtis to Skowhegan Gayton was on the business of his company. But we are satisfied that his offer to drive Miss Bicknell's automobile back to Lewiston was made solely as a favor to her. He would have us believe that he did so because he was in a hurry to get home. But the trip during the entire day seems to have been a very leisurely one. When they arrived at Monmouth they were going right home. Gayton's testimony negatives the idea that any stop or diversion was contemplated. He states that the distance was ten or twelve miles. They would have been home in approximately twenty minutes. Nothing which had happened previously that day indicates why time suddenly became so valuable. It is absurd to

suppose that the saving of two or three minutes on that ride was in any sense a factor in his driving Miss Bicknell's car.

February 16, 1936 Gayton gave a statement to a representative of the Merchants Mutual Casualty Company. In it he tells how the accident happened. Nothing is said as to the reason why he drove Miss Bicknell's car. There is merely the assertion that he drove it. Subsequently on March 6th he signed a further statement for the same representative of the same insurance company. This indicates clearly that in the interval all parties had become conscious of the fact that there was an important question as to the insurance covering the liability for the accident. Instead of a simple recital of facts the first paragraph contains in part a conclusion of law,— that he was not driving the car on the business of his company; the balance contains allegations obviously designed to build up that hypothesis. Then after consulting his attorney he added a further paragraph negativing all that he had said in the first. As a piece of evidence for or against either party to this controversy, this statement is utterly worthless.

We prefer to rely on the testimony of the three who drove that day to Skowhegan in Mr. Curtis' car. That testimony indicates clearly that Miss Bicknell, when they arrived near Monmouth where she had left her car, told her two companions that she hated to drive over that particular road after dark; and the only reasonable inference to be drawn from all the evidence is that Mr. Gayton undertook to drive her automobile home for her solely as an accommodation to her and that in so driving it he was not acting as the agent of his company on his company's business.

The cases are remanded to the sitting Justice for decrees dismissing the bills as to the Merchants Mutual Casualty Company but sustaining them as to the other defendants for the purpose of reaching and applying the proceeds of the insurance policy issued by the Travelers Insurance Company to the payment of the judgments recovered by the plaintiff to the extent of the limits set forth in such policy.

So ordered.

CHRISTINA M. COLLINS *vs.* MAINE CENTRAL RAILROAD COMPANY.

JAMES EDWARD COLLINS *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion, February 9, 1939.

RAILROADS. NEGLIGENCE. LAST CLEAR CHANCE DOCTRINE.

Where Trial Court directed verdicts for defendant, the facts would be viewed most favorably for the plaintiffs.

As against a bare licensee, a railroad company has a right to run its trains in the usual way, without special precautions, if the circumstances do not of themselves give warning of his probable presence, and he is not seen until it is too late.

To give one, using a railroad crossing, the rights of a traveller on a highway, under the doctrine of implied invitation, it is not essential that the use cover the period of years necessary for the acquirement of a prescriptive right. The invitation once extended, whether implied or express, gives right to an immediate use which continues until withdrawn or until the user, if he can prove the necessary elements of prescription, obtains such a right.

While the unobjected use by the public of a railroad crossing alone is not enough to establish an implied invitation, there may be facts as to its construction, maintenance, and use that will warrant a jury in finding such an invitation, and such facts present a question for the jury under proper instructions.

Generally, it is a defense to an action of tort that the plaintiff's negligence contributed to produce the injury, but where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant.

Liability in last clear chance is based on negligence, but the negligence on which liability is thus founded is not prior thereto, but the then failure to avoid the accident by the exercise of due care.

The doctrine of last clear chance chiefly relates to proximate cause. What is understood by it is this, that where plaintiff, by his own negligence, has placed himself in a dangerous position where injury is likely to result, defendant, with

knowledge or such notice as is equivalent thereto of plaintiff's danger, is bound to use reasonable care and diligence to avoid injurying plaintiff, and where by the exercise of such care he could do so but fails to avoid the injury, this negligence introduces a new element into the case and renders defendant liable, because such negligence becomes the direct and proximate cause of the injury.

It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precautions as a prudent man would take under similar notice.

The plaintiff's negligence either contributes as a proximate cause to the accident or does not. If it continues to the time of impact and is a contributing cause, he can not recover, and also, if it continues only to the time when the defendant thereafter by the exercise of due care can not prevent the collision, the doctrine of last clear chance does not apply. It is only the act of negligence of the defendant that is performed by commission or omission following the complete cessation of prior negligence of the plaintiff that can be held to be the proximate cause of the accident

On exceptions. Actions by plaintiffs against defendant to recover for personal injuries and property damage. Cases tried before jury. Verdicts in both cases were directed for the defendant, to which rulings exceptions were taken by plaintiffs. Exceptions sustained. Cases fully appear in the opinion.

Stern, Stern & Stern, for plaintiffs.

Perkins & Weeks, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. These actions concern a railroad crossing accident at Bangor on February 11th, last, in which the defendant's freight train locomotive collided with a truck then being driven by James, but owned by his wife, Christina Collins. He sues for personal injury and she for property damage.

Verdicts in both cases were directed for the defendant, to which rulings exceptions were taken and perfected.

A basic position taken requires first consideration, and that pertains to the standard of care required of observance by the defendant.

It is urged that the evidence fails to establish "the legal character of the crossing where the accident occurred . . . whether it was a public way or a private way, or whether plaintiffs as against the defendant had any right whatever to be using the crossing." The defendant contends that the only duty it owed the plaintiffs was to refrain from wilful, wanton, or reckless acts of negligence. It is not claimed there was, and we do not find in the record any evidence that would establish, any such negligence.

It does not appear that this way was ever legally established as a street or a highway. But may not the facts herein, viewed most favorably for the plaintiffs, as they must be (*Gould* v. *Maine Central Transportation Company*, 136 Me., 83, 1 A., (2d), 908; *Bryne* v. *Bryne et al.*, 135 Me., 330, 333, 196 A., 402), preclude the defendant from denying that it owed them a duty of due care? Was the driver of the truck an invitee by implication? No express invitation is claimed.

In *Chenery* v. *Fitchburg Railroad*, 160 Mass., 211, 35 N. E., 554, the trial judge refused to instruct that "if people were in the habit of using the crossing and the defendant had made no objection, the plaintiff was not a trespasser, and the defendant was bound to use reasonable care to protect her," but charged "that if, taking the whole condition of things into account, the physical condition of the crossing, the width of it, the extent to which it was travelled, etc., a reasonably intelligent and prudent man would have understood that the defendant by implication declared that the crossing was public, and that he, as a member of the public, might pass over it, the defendant was bound to do what was reasonable and necessary to do in order to protect an ordinarily intelligent and prudent man who was rightfully there." In the opinion it is stated:

> "As against a bare licensee, a railroad company has a right to run its trains in the usual way, without special precautions, if the circumstances do not of themselves give warning of his probable presence, and he is not seen until it is too late. . . . If the circumstances did give warning of the plaintiff's probable presence, it was because the mode in which the crossing was prepared, coupled with the other facts in evidence, showed an invitation, as that word commonly has been

used and understood. . . . Theoretically, at least, there must be a line at which the way in which the face of the earth is prepared will express the owner's assent to its being entered upon, and short of which it will not express such assent. . . . What, then, is it fair to require of an owner as against strangers? If they enter without his license, they are trespassers, however incompetent and wanting in judgment they may be. What must he do to diminish his rights? . . . It must be something which, by a general standard of understanding, gives leave to enter. That standard is the understanding of the ordinarily prudent and intelligent person, not man as against woman, but a person possessed of ordinary intelligence and prudence, as against one who has less than the ordinary."

In *Black* v. *Central R. Co.*, 85 N. J. L., 197, 89 A., 24, 51 L. R. A. (N. S.), 1215, it is said:

"Such liability is based not upon the landowner's dedication of the street and its acceptance by the public, but upon the appearances he has created, so that the question for the jury is not whether such acts of the owner were proof of an intention to dedicate a public street, but whether they had created an appearance calculated to induce the public to use the way in the belief that it was what it appeared to be.

"Although the fundamental principle that underlies this doctrine is that of estoppel, it is generally treated under the head of implied invitation, thereby distinguishing it from express or inferred invitation, which is limited to those having business with the owner of lands or upon his premises."

Also see *Texas & P. R. Co.* v. *McManus*, 38 S. W., 241, 242; *Markham* v. *Houston & T. C. R. R. Co.*, 1 Tex. App. Civ. Cas., 35; *Cowans* v. *Ft. Worth & D. C. R. Co.*, 89 S. W., 1116, 1117; *Taylor* v. *President, Etc., of Delaware & H. Canal Co.*, 8 A., 43 (Pa.); *Lodge et ux.* v. *Pittsburgh & L. E. R. Co.*, 89 A., 790 (Pa.); *Missouri P. R. Co.* v. *Bridges*, 12 S. W., 210; *Kelly* v. *Southern Minn. R. Co.*, 9 N. W., 588.

In the Kelly case, *supra*, is cited *Webb* v. *Portland & Kennebec R. Co.*, 57 Me., 117.

In the Webb case our Court stated "that it was not for the defendants to say in this action that there was no highway there, if there was a crossing which they and all others interested permitted the public to use as such, and which was, in fact, in great and constant use. Under such circumstances, the plaintiff would be there with the rights of a traveler on a highway, and as regarded him and all others traveling there, the defendants would be subject to the same duties and liabilities as if the street had been a highway *de jure* as well as *de facto*."

Also see *Moore* v. *Maine Central R. R. Co.*, 106 Me., 297, 301, 76 A., 871; *Boothby* v. *B. & M. R. R. Co.*, 90 Me., 313, 317, 38 A., 155.

To give one, using a railroad crossing, the rights of a traveller on a highway, under the doctrine of implied invitation, it is not essential that the use cover the period of years necessary for the acquirement of a prescriptive right. The invitation once extended, whether implied or express, gives right to an immediate use which continues until withdrawn or until the user, if he can prove the necessary elements of prescription, obtains such a right.

Our conclusion, then, is that, while an unobjected use by the public of a railroad crossing alone is not enough to establish an implied invitation, there may be facts as to its construction, maintenance, and use that will warrant a jury in finding such an invitation and such facts present, as said in *Black* v. *Central R. Co.*, supra, "a question for the jury under proper instructions. . . ."

Although in the instant cases there was not much evidence bearing upon the character of this crossing, there was some. It did appear that it was planked and graded and that without objection it had been used by the public for many years with full knowledge of the railroad company. In defendant's brief it is conceded that Mr. Collins "had been using this crossing frequently for five years peddling meat and fish to the Burke residence" and it is stated therein "It was not more frequently than once a week." Also from the defendant's testimony, the jury might have inferred from facts proven that the defendant was accustomed to whistle and ring the bell for this crossing until passed over. We are of the opinion there was sufficient evidence in the case to entitle the plaintiffs to have the question as to implied invitation submitted to the jury. If the

basis for the directed verdicts was that the duty owed was only that to a trespasser or a mere licensee, viz., to refrain simply from acts of wanton, wilful, and reckless conduct, and that there was no such evidence in the case, then, by refusal to submit the cases to the jury, the plaintiffs were denied the opportunity to have decided by it the factual questions of an implied invitation and, if found to have been given, performance of its consequent duty of due care.

LAST CLEAR CHANCE

In the early case of *O'Brien* v. *McGlinchy*, 68 Me., 552, this doctrine was clearly stated:

> "Generally, it is a defense to an action of tort that the plaintiff's negligence contributed to produce the injury. But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his property is in some position of danger from a threatened contact with some agency under the control of the defendant when the plaintiff cannot and the defendant can prevent an injury."

Recently this Court stated in *Kirouac* v. *Railroad Company*, 130 Me., 147, on page 149, 154 A., 81:

> "The plaintiff may still recover in spite of his agent's negligence, if there came a time prior to the collision, when his driver could not, and the defendant's motorman could, by the exercise of due care, have prevented the accident. . . . If the negligent operation of the truck continued to the moment of the collision, or for such a period of time that the motorman could not thereafter by the exercise of due care have stopped his car before the crash, there can be no recovery."

Counsel for the defendant argue: "The doctrine of last clear chance does not apply when the defendant is free from negligence."

If by that is meant negligence only antecedent to the time when the defendant has an opportunity to avoid the accident, we can not agree. We conceive that a defendant may be liable on the doctrine of last clear chance when his only negligence consists of failure, as the ordinarily careful and prudent person would not fail under like circumstances, to exercise the "last clear chance" to avoid the accident. True it is that liability in last clear chance is based on negligence, but the negligence on which liability is thus founded is not prior thereto, but the then failure to avoid the accident by the exercise of due care. Cited in support of defendant's contention is *Scripture* v. *Railroad Company*, 113 Me., 218, 93 A., 362, wherein it is stated:

> "Under this state of facts, the truth of which is fully established by the evidence, no legal liability for this accident was imposed upon the defendant. It had performed its legal duty and was guilty of no breach, either in the way of omission or commission. . . . Clearly the defendant was not negligent and the last chance doctrine does not apply."

We construe the last sentence quoted as meaning simply this, that the Court were of the opinion that the evidence clearly showed lack of all negligence upon the part of the defendant, including that which would be necessary to apply the doctrine of last clear chance,—that is, failure to avoid the accident by employment of due care. In 11 C. J., page 282, it is stated:

> "The doctrine chiefly relates to proximate cause. What is understood by it is this, that where plaintiff, by his own negligence, has placed himself in a dangerous position where injury is likely to result, defendant, with knowledge or such notice as is equivalent thereto of plaintiff's danger, is bound to use reasonable care and diligence to avoid injuring plaintiff, and where by the exercise of such care he could do so but fails to avoid the injury, this negligence introduces a new element into the case and renders defendant liable, because such negligence becomes the direct and proximate cause of the injury."

In Shearman & Redfield on Negligence, 5th Ed., Sec. 99, it is stated:

"It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. . . . the plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was more immediately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precautions as a prudent man would take under similar notice. This rule is almost universally accepted."

In *Gilbert* v. *Erie R. Co.*, 97 Fed., 747, the rule is stated in this language:

"That where the plaintiff, by his own negligence, has placed himself in a dangerous position, where injury is likely to result, the defendant, with knowedge, or such notice as is equivalent thereto, of the plaintiff's danger, is bound to use reasonable care and diligence to avoid injuring the plaintiff; and where, by the exercise of such care he could do so, fails to avoid the injury, this negligence introduces a new element into the case, and renders the defendant liable, because such negligence becomes the direct and proximate cause of the injury. We do not think the principle settled in these cases applies to a case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant."

We quite agree with defendant's contention that "The defendant is not rendered liable under the last clear chance rule if, in the exercise of due care, it could not prevent the accident after it acquired, or should have acquired, knowledge of the impending danger from which plaintiff could not extract himself."

It is also contended that "When the plaintiff's negligence continues *substantially* [italics ours] to the time of the accident he can not invoke the doctrine of last clear chance." It is not a matter of "substantial" continuance. The plaintiff's negligence either contributes as a proximate cause to the accident or does not. If it continues to the time of impact and is a contributing cause, he can not recover, and also, if it continues only to the time when the defendant "thereafter by the exercise of due care" (*Kirouac* v. *Railway Company*, supra, page 149) can not prevent the collision, the doctrine of last clear chance does not apply. It is only the act of negligence of the defendant that is performed by commission or omission following the complete cessation of prior negligence of the plaintiff that can be held to be the proximate cause of the accident.

While the opinion in *Butler* v. *Railway*, 99 Me., 149, 58 A., 775, cited by defendant, contains this statement on page 160, "The language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous," the opinion read as a whole clearly shows that if the defendant's negligence takes place "independent of and distinct from any prior negligence" of the plaintiff, the plaintiff's negligence is not the proximate cause of the injury and will not bar recovery. In the Butler case, it was held that the plaintiff's negligence continued to the time of collision and the Court said:

> "It is not like the case of one who by his own prior negligence has merely put himself in a position of danger. . . ."

Here we have two conflicting versions of fact, although as to some facts there is concurrence. This crossing is on a way that leads from State Street southerly over some trolley tracks and then over the crossing in question to property of the Bangor Water Works, and particularly for purposes of these cases, to a dwelling house, occupied by Mr. Burke, superintendent of the water works company.

Mr. Collins this day had occasion to make use of this way in delivering some fish at the Burke residence. He drove his truck southerly over the crossing to the Burke house, transacted his business, and came out. Then, he testified that, having left his truck about

twenty-five feet southerly of the crossing, before getting into it, he walked up toward the crossing and looked in both directions to see if a train were approaching, and saw none. On his left (westerly) as he walked up toward the crossing was a part of the Burke house which obstructed his vision in that direction, while on his right (easterly), the only obstruction to vision was the garage of the water works corporation.

The plan introduced as an exhibit shows that the view easterly from the crossing progressively increases from about four hundred feet when the truck driver is thirty feet southerly from the crossing to seven hundred twenty-five feet when at the crossing.

Mr Collins also says that, having taken this easterly view on foot, he got into the truck, immediately looked easterly, saw no train, proceeded to drive in low gear at six or seven miles per hour up toward the crossing, and that while so doing, until he got to within a foot or two of the planking, he was looking westerly (the train that hit him came from the east), because he knew that ordinarily at that time of the day a train did come from that direction. Although he had looked easterly when he first started, he did not again look in that direction until he was practically at the crossing. Then he looked to the east and saw the train approaching about three hundred paces from him. He decided he did not have time to cross the track, stopped the truck, and attempted to back out of danger, but his engine stalled when he had backed only about six inches. We quote from the direct examination of Mr. Collins:

"Q. As you looked to the right and saw this train coming around the bend as you testified, what did you do?

"A. Well, I stalled. I started my car and I put her in reverse gear, and she made a jump back, like that (indicating), and she stalled. It was kind of cold, and I kind of fumbled around with my foot for the starter, but I don't remember about that time. The train struck me. It seemed to be about three or four seconds."

So the plaintiffs contend that even if due to his own negligence Mr. Collins had gotten himself into a perilous situation, actually known to the defendant or which, in the exercise of due care, should have been discovered by it, his negligence ceased and thereafter the

defendant had an opportunity in the exercise of due care to avoid the collision, failed so to do, and is liable under the doctrine of last clear chance.

The defendant's version is quite different. It says that due to obstructions it was impossible for either the engineer or fireman to see the truck southerly of the railroad crossing until the engine was within one hundred eighty feet of the crossing. At that point, testified the fireman, he saw the truck some fifty feet southerly of the crossing, proceeding slowly toward it; expected the truck driver would stop and not go onto the crossing, but when the truck was some twenty-five feet southerly of it, saw there was every indication that the truck would not stop. He then hollered "Whoa," whereupon the engineer, not having seen the truck at all, put on the emergency brakes and sanded the rails. It appeared that the train could not be stopped in a less distance then three hundred feet. Thus the contention of the defense is that on the facts as they actually existed, it never had any "last clear chance" of avoiding the accident.

In support of its contention, the defendant takes certain figures as to time and distance and claims to be able to demonstrate mathematically that when this truck was seen or possible of being seen by the train operators, it was too late to avoid the accident by stopping the train. But these figures were not ascertained by time-piece and measure; they were only estimates. The jury might have found the train was proceeding less than twenty miles per hour and that the time was longer than Mr. Collins' estimate. Our Court said in *Ham* v. *Railroad Co.*, 121 Me., 171, on page 180, 116 A., 261, on page 265:

> "In fact mathematical calculations based upon mere estimates either of time or distance are apt to be misleading as a slight variation in the postulate creates a vast change in the mathematical result."

Also see *Bedell* v. *Railway Co.*, 133 Me., 268, 273, 117 A., 237.

It was for the jury to determine the speed of the train and how far from the crossing its locomotive was when its operators did see or, in the exercise of due care, should have seen Mr. Collins in a position of danger, although there due to his own act of negli-

gence; whether his negligence had then ceased; and whether thereafter the defendant could have avoided the collision by the exercise of due care.

Thus were raised typical jury questions which should have been submitted to that tribunal.

Exceptions sustained.

FORREST WELLS *vs.* MARK L. SEARS.

Piscataquis. Opinion, March 4, 1939.

MOTOR VEHICLES. NEGLIGENCE.

The well-established rule requires gratuitous passengers in automobiles to use ordinary care to warn of apparent danger, but where a passenger goes to sleep while riding in an automobile over the public highways and voluntarily allows a condition to exist which prevents him from using any degree of care or caution, the crux of the matter is whether the passenger, though alert and watchful, could have prevented the negligent act of the driver in colliding with another vehicle. If he could not, then his somnolent condition had no contributory causal connection with the accident.

Contributory or cooperative negligence exists where, but for the negligence or wrong of both parties, there would have been no injury.

Even though negligence of defendant is established, yet it is incumbent upon the plaintiff to prove that no want of due care contributed as a proximate cause of the injury.

An automobile guest is not contributorily negligent in being asleep at time of accident, unless there is causal connection between fact that guest was asleep and accident.

On exceptions by defendant to acceptance of Referee's report. The action is one brought by a guest passenger against the operator of the automobile in which he was riding. The Referee found for the plaintiff and assessed damages in the sum of $750 and costs. Exceptions overruled. Case fully appears in the opinion.

J. S. Williams, for plaintiff.

John P. White, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, MANSER, JJ.

MANSER, J. On defendant's exceptions to acceptance of Referee's report. The action is one brought by a guest passenger against the operator of the automobile in which he was riding. The Referee found for the plaintiff and assessed damages in the sum of $750 with costs. The legal issues raised by the exceptions are made clear by a recital, as far as germane, of findings of the Referee.

"Just prior to the collision an automobile driven by one, Guy E. Annis, approached the highway from a private driveway on defendant's right. Mr. Annis was a contractor having men at work in the near vicinity of the highway and opposite the private driveway. He turned his automobile in the same direction in which the defendant's automobile was proceeding and stopped upon the extreme right, the wheels upon the left side of his car extending less than two feet upon the tarvia road, the remainder of the automobile being outside the traveled part of the highway. The highway at this point had a tarvia surface and was approximately thirty feet in width. There was no other traffic in the vicinity at this time. At about the time the Annis car came to a stop the defendant's automobile struck it with great force, the collision resulting in the complete destruction of the defendant's automobile.

"I find the defendant guilty of negligence. The defendant, however, contends that the plaintiff was guilty of contributory negligence as a matter of law in that he was asleep at the time the accident occurred. I do not agree with this contention. I rule that the question of plaintiff's contributory negligence is a question of fact .... In this case if the plaintiff was negligent in falling asleep, this negligence did not contribute to cause the accident. It is clear that the collision was due to the failure of defendant to so guide his automobile as to avoid a collision with the Annis car which was occupying not more than two feet of the traveled highway upon his right. The plaintiff if awake and alert could not reasonably have been expected to warn the driver of the presence of the Annis car which was in plain view and which could have readily been

avoided. While the speed of defendant's car was in excess of the statutory limit it is not claimed that the car was not under complete control."

There were ten exceptions. Three have to do with the findings of the Referee with respect to the negligence of the defendant and one as to the amount of damages. The record amply discloses that there is no merit in these exceptions.

Because of an apparent misconception of the effect of the finding by the Referee, one of this group of exceptions may be noted. It is, in substance, that the Referee held the defendant to be guilty of negligence because he was driving the automobile in excess of the speed limit although he had the car under complete control. This is not the correct interpretation of the finding. The defendant was found guilty of negligence because, although his car was under control and there was no occasion for any accident, yet he carelessly allowed a collision to occur.

The essence of the remaining exceptions is that the Referee should have ruled as a matter of law that the plaintiff was guilty of contributory negligence by reason of the fact that he was asleep at the time of the accident.

The particular case relied upon is that of *Oppenheim* v. *Barkin*, 262 Mass., 281, 159 N. E., 628. In that case, the defendant operator of the car had left New York about five P. M., reaching Springfield after one o'clock in the morning and going from there to Worcester, which was reached about four o'clock. The accident happened about two miles east of Worcester. The defendant drove the car during the entire trip. The court found no reason for the accident unless the defendant had fallen asleep. The plaintiff also was asleep. The ruling of the court was:

"A guest on the rear seat of an automobile cannot be expected to control its operation or interfere with its movement, but he must exercise some care. If the plaintiff saw that the defendant was asleep, or, if he were awake and the plaintiff saw him turning away from the line of travel across the highway to the left, it could have been found to be the plaintiff's duty to arouse the defendant or warn him of the approaching danger; or for the plaintiff to take some precaution for his

> own safety. This the plaintiff failed to do; he entrusted himself entirely to the care of the defendant, placing absolute reliance on the defendant's caution."

Under the facts of that case, the statement of the legal principle involved was perhaps sufficient but it fails to include the important element of causal connection.

It may be said that a passenger, who goes to sleep while riding in an automobile over the public highways, voluntarily allows a condition to exist which prevents him from using any degree of care or caution for his own safety and the well-established rule requires gratuitous passengers in automobiles to use ordinary care to warn of apparent danger. The crux of the matter is, however, whether the passenger, though alert and watchful, could have prevented the negligent act of the driver in colliding with another vehicle. If he could not, then his somnolent condition had no contributory causal connection with the accident.

In a series of cases our Court has given effect to this principle. In *Peasley* v. *White*, 129 Me., 450, 152 A., 530, 531, it was held:

> "The plaintiff was bound to exercise some degree of care. He could not wholly escape the duty of keeping a lookout and warning the driver of apparent danger. This duty did not require or empower him to assume control of the car, and *if in the exercise of reasonable care he could not have done anything to avert the accident, he is not barred from recovery.*"

Also in *Rouse* v. *Scott*, 132 Me., 22, 164 A., 872, 873, we find the statement:

> "The plaintiff not only had the burden of establishing the negligence of the defendant, but also that he himself was free from negligence which was a *contributing proximate* cause of the collision."

Again in *Field* v. *Webber*, 132 Me., 236 at 241, 169 A., 732 at 735, the principle is thus defined:

> "In order to constitute contributory negligence, act or inadvertence of plaintiff, amounting to a breach of duty which

the law imposes upon persons to protect themselves from harm, must so unite with actionable negligence of defendant as to make the damage complained of, the direct result of such mutual and cooperating negligence."

To the same effect, in *Eaton* v. *Ambrose*, 133 Me., 458, 180 A., 363, 364, we find tersely stated:

"Contributory or cooperative negligence exists where, but for the negligence or wrong of both parties, there would have been no injury." *Alexander* v. *Mo. etc., R. R. Co.*, 287 S. W., 153 at 155."

The case of *Banks et al.* v. *Adams & Ry. Co.*, 135 Me., 270, 195 A., 206, 209, points out that:

"Even though negligence of the defendant, Adams, is established, yet it is incumbent upon the plaintiffs to prove that no want of due care contributed as a *proximate cause* of the injury. Each case must be governed by its own facts and circumstances."

The case at bar must likewise be governed by its own circumstances. The Referee found that the alleged negligence of the plaintiff was not a proximate cause of the accident and such finding was one of fact, undoubtedly in agreement with the reasoning applied in *Gallup* v. *Lazott*, 171 N. E., 658, 271 Mass., 406:

"Obviously, the occurrences at the time of the accident were so nearly instantaneous that no effective warning could have been given or other act done then by the deceased to avert it."

See also *Kimball* v. *Bauckman*, 131 Me., 14 at top of p. 21, 158 A., 694; Huddy, Automobiles 5–6, p. 239; also p. 246; *Simrell* v. *Eschenbach*, 303 Pa., 156, 154 A., 369; *McAndrews* v. *Leonard*, 99 Vt., 512, 134 A., 710; *Curran* v. *Anthony, Inc.* (Cal.), 247 Pac., 236; *Munson* v. *Rupker* (Ind.), 151 N. E., 101; *Chapman* v. *Mo. Pac. R. Co.*, 269 S. W., 688.

The Iowa case of *Fry* v. *Smith*, 253 N. W., 147, gives particular consideration to *Oppenheim* v. *Barkin*, supra, relied upon by the defendant and makes this comment, with which we agree:

"It is apparent from the above cases that the courts are not agreed in holding that the mere fact that a passenger in an automobile was asleep at the time of an accident is in and of itself contributory negligence, as a matter of law. That it might, as a matter of law, be contributory negligence for a passenger to go to sleep under certain circumstances may be admitted; but we are not prepared to accept the doctrine that the mere fact that a passenger in an automobile voluntarily goes to sleep must in all cases and under all circumstances be held to constitute contributory negligence. In any event, we think that, in order to defeat the recovery of a plaintiff who has been asleep at the time of an accident, on the ground that this constituted contributory negligence, there must be a causal connection between the fact that the plaintiff was asleep and the accident."

The entry will be

Exceptions overruled.

STATE OF MAINE *vs.* RAYMOND P. PETERSON.

Cumberland. Opinion, March 10, 1939.

CRIMINAL PLEADINGS. WORDS AND PHRASES.

In criminal pleading, slight defects may be of no invalidating character; nevertheless, essential elements must be set down in the complaint or indictment with some degree of particularity. In asserting any violation of a penal or criminal statute, the instrument must in itself allege whatever is necessary to bring the prosecution within legislative meaning and intent. Nothing can be supplied by intendment, argument or implication.

As used in R. S., Chap. 29, *Sec.* 88, *as amended by P. L.* 1935, *Chap.* 89, the *word "way," save where context indicates otherwise, includes all kinds of public ways.*

It may well be that in ordinary vehicular transportation conception, the term route designates an improved highway from town to town or place to place, open generally to the reasonable use of the public, without distinction, for passage and repassage at pleasure.

The word route may aptly have a different sense; route sometimes points out or distinguishes a course, a line of travel or of transit.

Seeking necessary information, constituting a criminal charge, investigation is limited to what, as regards the commission of an offense, written accusation apprises.

It is well settled in this jurisdiction that the charge must be laid positively, and not informally or by way of recital merely.

On the criminal side, it is required, as well by the common law as the Constitution, that to bring a case within the law, a sufficient case must be set forth.

On exceptions. Respondent charged with operating motor vehicle while intoxicated. Proceedings instituted before a trial justice. Conviction followed hearing. Respondent appealed to the Superior Court for the County of Cumberland and was found guilty on trial by jury. Motion in arrest of judgment filed. Motion denied. Exception. Exception sustained. Judgment arrested. Case fully appears in the opinion.

Albert Knudsen, County Attorney,

Richard S. Chapman, Assistant County Attorney, for the State.

Milan J. Smith, for respondent.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. The respective briefs in this criminal case refer to the denial of a motion in arrest of judgment. The proceeding had been instituted before a trial justice. Conviction followed hearing. The respondent appealed to the Superior Court; on trial by jury he was found guilty. Thereupon, it was unavailingly pressed upon the attention of the Judge that all the complaint alleged might be true, and yet no punishable wrong have been committed.

A bill of exceptions brings the case here.

The single question is whether the complaint, on which the warrant for arrest was issued, states, on its face, facts constituting an offense.

In criminal pleading, slight defects may be of no invalidating character; nevertheless, essential elements must be set down in the complaint or indictment with some degree of particularity. In as-

serting any violation of a penal or criminal statute, the instrument must in itself allege whatever is necessary to bring the prosecution within legislative meaning and intent. *Moulton* v. *Scully*, 111 Me., 428, 441, 89 A., 944; *State* v. *Conant*, 124 Me., 198, 126 A., 838. Nothing can be supplied by intendment, argument or implication. *State* v. *Paul*, 69 Me., 215, 218.

This complaint was, concededly, framed to accuse transgression of a statute, the pertinent portion of which runs as follows:

> "Whoever shall operate or attempt to operate a motor vehicle upon any way, or in any other place when intoxicated or at all under the influence of intoxicating liquor or drugs, upon conviction, shall be punished by a fine of not less than $100 nor more than $1000 or by imprisonment for not less than 30 days nor more than 11 months, or by both such fine and imprisonment." R. S., Chap. 29, Sec. 88, as amended by P. L. 1935, Chap. 89.

As used in the statute, the word "way," save where context indicates otherwise, includes all kinds of public ways. R. S., Chap. 29, Sec. 1. (1935 and 1937 amendments work no change in this connection.)

The body of the complaint details that:

> "Raymond P. Peterson, Cumberland, Maine on May 21, 1938 operated a motor vehicle over and on Route 3 in Gray while he was then and there under the influence of intoxicating liquor, against the peace of the State and contrary to the form of the Statute in such case made and provided."

The exceptant contends that the complaint is fatally insufficient — first in that it neither states that while he himself was under the influence of intoxicating liquor, he drove his motor vehicle upon a public way, nor then operated it elsewhere; also that lack of verbal precision leaves process too general and uncertain to sustain the verdict.

Contention is not without convincing force.

If design was to aver, in effect, that the accused, his mental and physical condition affected as a consequence of his having indulged in intoxicants, drove his vehicle on a public way, then the language

employed to put such thought on paper is indefinite. Allegation relative to where the driving was, is no more specific than "Route 3 in Gray."

A route has been defined as a way used in going from one place to another. *Attorney General* v. *West Wisconsin, etc., Co.*, 36 Wis., 466, 494. The cited case concerns a railroad route. It may well be that in ordinary vehicular transportation conception, the term route designates an improved highway from town to town, or place to place, open generally to the reasonable use of the public, without distinction, for passage and repassage at pleasure.

But the word route may aptly have a different sense; route sometimes points out or distinguishes a course, a line of travel or of transit. 54 C. J., 1106; *Louisiana Highway Commission* v. *Cormier*, 13 La. A., 459, 128 So., 56, 61. "Wide through the furzy field their route they take." (Quoted in Webster's International Dictionary.)

Seeking necessary information in a situation like this, investigation is limited to what, as regards the commission of an offense, written accusation apprises. *State* v. *Paul*, supra; *State* v. *Conant*, supra.

If, to recur to the complaint, purpose was to say that while liquor swayed his conduct, the operator ran his machine in some place other than on a public way, declaratory words vary greatly in color and content from saying so.

The complaint is not, with regard to all the ingredients of the offense it would impute, exact enough; it does not keep sufficiently close to rule; because it is wanting in preciseness, the same defendant could not, in the event of a subsequent criminal action, for the same offense, in law and in fact, plead as a bar the double jeopardy provision which forbids punishing twice. Constitution of Maine, Article 1, Section 8; *State* v. *Lashus*, 79 Me., 541, 11 A., 604; *State* v. *Hosmer*, 81 Me., 506, 17 A., 578; *State* v. *Shannon*, 136 Me., 127, 3 A., (2nd), 899. It is settled in this jurisdiction that the charge must be laid positively, and not informally or by way of recital merely. *State* v. *Paul*, supra. See *State* v. *Strout*, 132 Me., 134, 136, 167 A., 859; *State* v. *Beckwith*, 135 Me., 423, 198 A., 739. See, too, *Ex parte Lange*, 18 Wall., 163, 21 Law Ed., 872.

On the criminal side, it is required, as well by the common law as

the Constitution, that to bring a case within the law, a sufficient case must be set forth. *Com.* v. *Bean*, 14 Gray, 52.

The complaint attacked fails. Notwithstanding the verdict, no judgment can be rendered.

Exception sustained.
Judgment arrested.

STATE OF MAINE *vs.* JAMES V. CALIENDO.

Oxford. Opinion, March 16, 1939.

ARSON. EVIDENCE. CRIMINAL LAW.

In a prosecution for arson evidence that the respondent had overinsured his personal property, that insurance carried by his wife who owned the building was excessive, and that respondent's business was not profitable at the time of the fire, was admissible to establish motive, and on a charge of arson based on circumstantial evidence, is of significance in determining the guilt or innocence of the accused. Proof of motive, however, does not alone establish guilt.

Any statement or conduct of a person indicating a consciousness of guilt, where at the time or thereafter he is charged with a crime, is admissible against him on his trial.

Where accused had attempted to procure the absence of witnesses for the State by threats of violence or otherwise, though not conclusive, is a significant circumstance to be weighed by the jury. It is in the nature of an admission of guilt.

Weight of evidence intrinsically destitute of probative value is not enhanced by its admission without objection.

The State is bound to prove all the elements of the crime of arson beyond a reasonable doubt, and if it relies solely on circumstantial evidence to establish the guilt of the accused, it must prove each and every circumstance upon which a conviction must rest beyond a reasonable doubt, and the evidence must be sufficient to exclude beyond a reasonable doubt every other reasonable hypothesis except that of the respondent's guilt.

It is not necessary, to constitute arson, that any of the buildings should be consumed. If any part, however small, be ignited, the offense is committed.

In a criminal prosecution mere suspicion, however strong, will not supply the place of evidence and warrant a conviction.

On appeal. At the June Term, 1938, of the Superior Court for Oxford County respondent was tried for arson and found guilty. Motion for new trial, addressed to presiding Justice, was denied. Respondent appealed. Appeal sustained. Case fully appears in the opinion.

Robert T. Smith, County Attorney for State.

Aretas E. Stearns, for respondent.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. At the June Term, 1938, of the Superior Court for Oxford County the respondent was tried for arson and found guilty. After verdict, his motion for a new trial, addressed to the presiding Justice, was denied and his appeal from that ruling is before the Law Court. The question presented is whether upon all the evidence the jury were warranted in finding beyond a reasonable doubt that the respondent was guilty of the crime charged in the indictment.

The printed case brought forward with the appeal shows that just before one o'clock in the morning of March 26, 1938, fires were discovered in the barroom and kitchen which respondent operated in connection with his barber shop on the street floor of the three-story building situated on Bridge Street in Mexico and owned by Annie Caliendo, his wife. The second floor of the building was let to a tenant for dwelling-house purposes. The rooms in the upper story were not in use at the time of the fire.

When the firemen arrived and forced their way into the building with a fire hose, they found a beer case partially filled with rubbish, cloths and towels burning in the barroom and a similar case containing burlap, towels and charred paper on fire in the kitchen which adjoined the barroom. An examination of the cases and their contents disclosed that they had been saturated with range oil or kerosene and beside one there was oily glass from a broken milk bottle. The fire in the kitchen had burned through the floor and into the timbers below, and the woodwork against which the case in the barroom was driven when the stream from the fire hose struck it

was blazing. The fires were promptly extinguished, however, and no great damage to the building or its contents resulted.

It is clearly apparent from the evidence that the fires had not been burning for any great length of time before they were discovered and the alarm given. The saturated beer cases and the rubbish in them were highly inflammable and must have burned rapidly when ignited. No candle, fuse, contrivance or device of any sort designed to produce delayed ignition was found in or about the beer cases or the premises. The tenant and his wife, who lived in the second floor rent, returned from the pictures just after midnight, passed by one of the windows in the respondent's barroom as they went up the outside stairs at the back of the building, and saw no signs of fire. About twenty minutes later, as this tenant sat in his bedroom smoking, he heard a noise downstairs and, becoming uneasy, went out into the kitchen to investigate, but heard nothing and returned. In another twenty minutes, he smelled oil burning and again going into the kitchen was met with a spout of smoke coming from below. Waking his wife, they hurried down the outside stairs over which they had come up an hour earlier and as they passed the barroom window saw flames inside rising to the ceiling. He ran to the nearest fire-box and rang in an alarm. His wife sought refuge at the home of a neighbor.

The respondent, through his counsel, conceded that the fires were of incendiary origin but denies that he directly or indirectly set them. He is supported by witnesses for the prosecution in his assertion that he left his shop and barroom just before midnight and practically an hour before the fire broke out, and at that time neither of the oil-saturated beer cases of rubbish were in the places where they were found by the firemen or on fire. All through the evening, patrons had been in and about both the barber shop and the barroom, and at no time was he there alone with opportunity to place and prepare the cases. He rode home from the shop in his truck taking one Ramsey, who was in there when he closed up, to the corner of the street on which he lived and then he drove directly to his own house. His departure for and his arrival at his home is verified by an apparently credible and intelligent witness who was passing the barber shop when he and Ramsey rode away and, hav-

ing travelled by a short and direct route, was at the respondent's driveway when he rode in there, got out of his truck and went up over the steps to his back door. The respondent's daughter, a school teacher, heard her father drive into the yard with his truck, come into the house and go upstairs. Being unable to retire on account of the illness of a young nephew, she was up and about the house, heard her father snoring and is positive that he did not leave the house after he came in. A little after one o'clock, receiving a telephone message informing her that the shop and barroom were on fire, she notified her father, who immediately dressed and accompanied her down to the shop.

The evidence against the respondent is purely circumstantial. No one saw him at or near the building which was burned after he closed up his barber shop and left for home, nor is there any direct proof that he left his house again until he and his daughter came down to the fire in response to the telephone call. No more is it shown that the respondent at any time possessed any means, contrivance or device for setting fires by delayed ignition. He did have the only keys known to be in existence which fitted the door of the barber shop and permitted entrance to all of the rooms on the street floor of the building. The back door was locked and the key had been lost. He had locked the front door when he left the shop just before midnight and took the key away with him. The firemen, when they arrived, found one of the windows in the barroom locked and it was broken open when the hose was run into the room. No one seems to know whether the other barroom window was locked or not. One of the windows in the kitchen was fastened with a bar diagonally across the upper sash and the other window in that room was partially boarded up. There was a window opening from the outside into a toilet, of rather small dimensions but large enough for a person to crawl through as had been done on one occasion before the fire when the store was broken into. Although ready access from this toilet to the barroom and kitchen was available, it does not appear that this window was locked. The evidence on this angle of the case establishes only that the respondent, through his possession of the key to the front door, had access to the premises where the fire started and equal opportunity with others to enter the building through unfastened windows.

There is evidence in the case tending to show that the respondent had overinsured his personal property in the barber shop and adjoining rooms and that the insurance carried by his wife on her building was also somewhat excessive; also that the respondent's business was not profitable at that time of the year. This evidence was admissible to establish motive, and on a charge of arson based on circumstantial evidence, is of significance in determining the guilt or innocence of the accused. *State* v. *Watson*, 63 Me., 128, 136; *Commonwealth* v. *Hudson*, 97 Mass., 565; Underhill's Crim. Ev., Sec. 563. Proof of motive, however, does not alone establish guilt. *State* v. *Ruckman*, 253 Mo., 487, 161 S. W., 705; *State* v. *Cohn*, 9 Nev., 179; II Wharton's Crim. Ev. (10th Ed.), 1646.

The State called the respondent's barmaid who testified that he called on her before the trial, accused her of falsely circulating stories that he had threatened to set the fire, and upon her denial of his charge, advised her to keep away from the trial by leaving town if necessary, and if she did anything out of the way to hurt him, the boys would be after her. What boys he referred to is not made to appear. And except as she repeated the advice and threat of the respondent, the barmaid gave no damaging testimony against him. His fears as to her ability and willingness to furnish evidence for the State were apparently groundless but his conduct, if the jury believed the barmaid's story, remains an incriminating circumstance which may well have weighed against him in their minds. Any statement or conduct of a person indicating a consciousness of guilt, where at the time or thereafter he is charged with a crime, is admissible against him on his trial. Under this rule, it is held that proof that the accused has attempted to procure the absence of witnesses for the State by threats of violence or otherwise, though not conclusive, is a significant circumstance to be weighed by the jury. It is in the nature of an admission of guilt. *Collins* v. *Com.*, 75 Ky., 271; *Com.* v. *Smith*, 162 Mass., 508, 39 N. E., 111; *State* v. *Mathews*, 202 Mo., 143, 100 S. W., 420; *Adams* v. *People*, 9 Hun. (N. Y.), 89; *State* v. *Little*, 174 N. C., 793, 94 S. E., 97; *State* v. *Manley*, 82 Vt., 556, 74 A., 231; Underhill's Crim. Ev. (3rd Ed.), Sec. 207.

The State also introduced without objection proof that on several previous occasions fires had broken out in buildings owned

by the respondent and his wife and insurance had been paid on the losses. These incidents, we are convinced, had no real or rational relation to the fires involved in this prosecution and should have been excluded if objection had been made. No evidence of probative value tends to show that the respondent was responsible for the earlier fires or even that they were of incendiary origin. The weight of evidence intrinsically destitute of probative value is not enhanced by its admission without objection. There was no legitimate purpose for which the jury could consider this evidence offered by the prosecution. *Brock* v. *State*, 26 Ala., 104; *State* v. *Raymond*, 53 N. J. L., 260, 21 A., 328; *People* v. *Fitzgerald*, 156 N. Y., 253, 50 N. E., 846; I Wharton's Crim. Ev. (10th Ed.), Secs. 30–38.

Arson is and always has been regarded as one of the most serious offenses known to the criminal law. It is a crime which is rarely committed in the open and in the presence of witnesses, is usually most difficult to prove, and often can only be established by circumstantial evidence. The State is bound to prove all the elements of the crime beyond a reasonable doubt. If it relies solely on circumstantial evidence to establish the guilt of the accused, as in all other felonies, it must prove each and every circumstance upon which a conviction must rest beyond a reasonable doubt, and the evidence must be sufficient to exclude beyond a reasonable doubt every other reasonable hypothesis except that of the respondent's guilt. *State* v. *Richards*, 85 Me., 252, 255, 27 A., 122; *State* v. *Terrio*, 98 Me., 17, 56 A., 217; *State* v. *Cloutier*, 134 Me., 269, 186 A., 604.

In this case, the *corpus delicti* of the arson is clearly established. The kitchen floor and the timbers below, as also some of the partitions, were set on fire. It is not necessary, to constitute arson, that any of the building should be consumed. If any part, however small, be ignited, the offense is committed. *State* v. *Taylor*, 45 Me., 322. The beer cases and their contents where the fire started, their location in the barroom and kitchen, and their saturation with oil leave no doubt that the burnings were not accidental but wilfully and maliciously caused by a human agency. As already stated, the respondent concedes that the fire was incendiary.

Motive is also sufficiently established and, along with it, that the respondent had a possible but not the exclusive opportunity to commit the crime. Proof that the fire was incendiary, and these cir-

cumstances, coupled with the evidence of conscious guilt found in the respondent's advice and threats to his barmaid, are consistent with his guilt and raise a strong suspicion of it, but mere suspicion, however strong, will not supply the place of evidence and warrant a conviction. *State* v. *Richards*, supra; *State* v. *Morney*, 196 Mo., 43, 93 S. W., 1117; Underhill's Crim. Ev. (3rd), Sec. 18.

The link which is lacking in the chain of circumstantial evidence which the State has woven around the respondent is proof that he was present in his wife's building when it was fired and participated in the burning. Other circumstances proven do not point irresistibly and beyond a reasonable doubt to that fact. The presumption of innocence with which he is clothed has not been overcome by the prosecution.

Appeal sustained.

EASTPORT WATER CO. *vs.* J. W. RAYE, APLT.

EASTPORT WATER CO. *vs.* HENRY MALLOCH, APLT.

EASTPORT WATER CO. *vs.* GRACE MALLOCH, APLT.

EASTPORT WATER CO. *vs.* HAROLD STACKHOUSE, APLT.

Washington. Opinion, March 18, 1939.

PUBLIC UTILITIES.

Where new schedule of water rates filed by plaintiff company had been made effective by Public Utilities Commission, court could not reinstate a former maximum charge made by plaintiff company.

Where after enactment of Public Utilities law plaintiff company filed schedule which contained no mention of maximum charge allowance, but plaintiff company continued to make such charge until September 1, 1935, *when plaintiff company duly filed and placed in effect new rates, water consumers were liable for water in accordance with new rates which were not limited to the prior maximum charge.*

On report on agreed statement. Four actions in assumpsit for service rendered, brought by plaintiff water company. Sole defense relied on is that a certain maximum charge formerly accepted be applied in reduction of bills rendered for service in periods since August 31, 1935. Judgment for the plaintiff in each case. Cases fully appear in the opinion.

Merrill & Merrill, for plaintiff.

Jonah & McCart, for defendants.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

BARNES, J. These four actions are for water service furnished the several defendants by the plaintiff company and come up on report from the Superior Court. Plaintiff, a public service corporation, was supplying water to residential customers, such as these defendants, prior to the enactment of the Public Utilities law, Chap. 129, P. L. 1913, now Chap. 62, R. S. of Maine, a law that became effective, after referendum to the people, in 1915, and so continuing to this date.

Before the enactment of the said law, plaintiff charged for the use of water on a fixture charge basis, with a maximum rate of twenty-five dollars (yearly) for a single family dwelling-house in which there were fixtures to aggregate a total of twenty-five dollars or more.

At this time there was in Maine no public commission having control of rates, tolls or charges of a water company serving the general public.

After the effective date of the Public Utilities law companies such as the plaintiff were required to file with the commission all their existing rates, the law providing that the only method of subsequently changing such rates was by filing proposed new rates; and that upon such filing of proposed new rates either the commission or interested parties might object to changes; or, if change in existing rates were desired in a particular field the same could be sought by public complaint against the utility, filed with the commission. In cases where no protest was raised before the commission, rates filed became the effective rates of the company.

In the original enactment provision was made for the filing and fixing of rates of a going concern, as follows:

> "Sect. 19. Every public utility shall file with the commission within a time to be fixed by the commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it or in conjunction therewith. The rates, tolls and charges shown on the schedules first to be filed shall not exceed the rates, tolls and charges which were in force on January first, nineteen hundred and thirteen, except that the rates, tolls and charges of utilities under the jurisdiction of the Interstate Commerce Commission, shown on the schedules first to be filed, shall be the rates, tolls and charges in force when this Act goes into full effect."
>
> P. L. 1913, Chap. 129, Sec. 19.

Susequent to the act becoming law, plaintiff filed its first schedule of rates, which contained no mention of maximum charge allowance, but in all other particulars the filed schedule was in accord with requirements of law. Whether failure to file statement of maximum charge of twenty-five dollars per year was accidental or no, such charge was continued, in subject cases, till September 1, 1935, when plaintiff duly filed and placed in effect the rates as contained in its schedule in accordance with which items were charged and collection is sought by appropriate writs now before us, for water service, less credits given and "allowance for vacancy," if any: J. W. Raye, September 1, 1935 to February 28, 1937, $33.00; Henry Malloch, September 1, 1935 to February 28, 1937, $15.84; Grace Malloch, December 21, 1935 to August 31, 1937, $45.21; Harold Stackhouse, September 1, 1935 to February 28, 1937, $13.50.

After a schedule of rates is made effective by the commission, Section 30 of said Chapter 62, R. S., makes it unlawful, as applied to cases such as here at bar, for any public utility to charge, demand, collect, or receive a greater or less compensation for any service performed by it or for any service in connection therewith

than is specified in such printed schedules as may at the time be in force, or to demand, collect or receive any rate, toll or charge not specified in such schedules, and the rates, tolls and charges named therein shall be the lawful rates, tolls and charges until the same are changed as provided in said chapter.

Request for reinstatement of a former maximum charge custom can not be considered.

Such practice is prohibited by law.

Finally, it being agreed in the report of the cases, "that the charges made for water furnished the defendants are in accord with the schedule of rates of the plaintiff company duly filed and promulgated in accordance with law and in effect for the period in which said water was furnished, unless said charges are limited to the maximum quarterly charge hereinbefore set forth," we find for the plaintiff in each case, and for the several sums respectively as above set out.

So ordered.

JAMES C. MADIGAN,
RECEIVER OF FARMERS NATIONAL BANK OF HOULTON

vs.

HAZEL H. LUMBERT.

Aroostook. Opinion, April 5, 1939.

BILLS AND NOTES. FINDINGS OF FACT.

As to liability of an accommodation maker, the law as it appears in our Uniform Negotiable Instruments Act governs, for only therein is such liability established.

An accommodation party is liable to one who holds the instrument as a holder for value unless in other respects it appears he is not a holder in due course.

When a trial by jury is waived and the parties submit their cause to a single Justice, the Law Court has nothing to do with the facts as found. Its only duty

is to determine whether the law has been rightly applied to those facts as found by the judicial referee.

So far as relates to the effect of the testimony, if admissible, the judgment of the justice by whom the cause was heard, is conclusive.

On exceptions. Action by James C. Madigan, receiver of Farmers National Bank of Houlton, against Hazel H. Lumbert to recover amount due on a promissory note upon which the defendant is an accommodation maker. Case tried before Justice of the Superior Court without a jury. Judgment for plaintiff. Defendant filed exceptions to decision. Exceptions overruled. Case fully appears in the opinion.

Doherty & Brown, for plaintiff.

Raymond S. Oakes, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. On exceptions by defendant to a decision by a Justice of the Superior Court, who, hearing the case without jury (Sec. 26, Chap. 91, R. S. 1930), rendered judgment for the plaintiff.

On or shortly before December 8, 1928, A. L. Lumbert, an attorney and business man in Houlton, presented to his wife, the defendant, a promissory note form which for his accommodation she signed in blank, which the briefs of counsel mutually concede. Filled in by him it read:

"15,000.00 Houlton, Maine, Dec. 8, 1928

"On demand after date I promise to pay to the order of A. L. Lumbert Fifteen Thousand Dollars Payable at Farmers National Bank of Houlton. with interest

Value received HAZEL H. LUMBERT"

The payee discounted this note at the bank, receiving therefor fifteen thousand dollars ($15,000) either in credit or cash.

For determination by the single Justice was the liability, if any, of an accommodation maker of a promissory note negotiated by the accommodated payee at a national bank in obtaining a loan in

excess of his borrowing capacity. U. S. C. A., Title 12, Sec. 84.

As to liability of an accommodation maker, the law as it appears in our Uniform Negotiable Instruments Act (Chap. 164, R. S. 1930) governs, for only therein is such liability established.

Section 29 of the Negotiable Instruments Act, *supra*, provides:

> "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

Considering this section alone, the defendant would be liable as an accommodation maker if it were determined that the plaintiff were only "a holder for value." (It is not claimed that the plaintiff is not.) But other sections of the act must be considered in determining the question presented.

In Beutel's Fifth Edition of Brannan's *Negotiable Instruments Law*, it is said on page 387:

> "It has been agreed with some force that this section of the act is defective in that it allows a 'holder for value,' even though he is not a holder in due course, to recover from an accommodation maker, thus giving a holder of such paper greater rights than a holder of other paper. Taking this sentence literally and by itself there might be some justification for such a position; but when it is read in light of section 16 which makes delivery 'for a special purpose' a defense against parties 'other than a holder in due course,' together with section 55 which makes 'negotiation in breach of faith' a defect of title, and in light of section 58 which provides that 'in the hands of a holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable,' it is clear that such defect is entirely removed and amendment seems unnecessary."

These words quoted were written in answer to a suggestion by Professor Brannan that "Section 29 should be amended by substitut-

ing the words 'one who is in other respects a holder in due course' for the words 'a holder for value,' . . ." *Harvard Law Review*, Vol. 26, pages 493, 494, *et seq.*

If Section 29 had been amended as suggested, or if without amendment, because of other sections mentioned it should be interpreted to have meaning as though so amended, then this plaintiff can not recover unless it appears that it is not only a holder for value, but also a holder in due course. Otherwise, as stated in Brannan, *supra*, on page 390 (then dealing with a negotiation after maturity), ". . . the holder for value of accommodation paper occupies a position superior to that of any other purchaser of negotiable paper, since there is no other requirement for his recovery except that he be a holder for value," and, as there said, there would be liability if a plaintiff were simply a holder for value, even though "the instrument was not complete and regular upon its face," were "obtained by fraudulent representations or by threats or undue influence," or were "given upon an illegal consideration, e.g., given to effect a violation of the liquor law or to furnish a house of prostitution or to aid in a burglary or a murder. It might have been signed in blank with an agreement that it should be filled up for a certain sum, and yet be filled up by or in the presence of the transferee for a larger sum."

Also see Sec. 755 on page 335, C. J. S., Vol. 11, where it is stated:

> "While § 29 of the Negotiable Instruments Act takes away the defense as against a holder for value that he took the instrument with knowledge that it was accommodation paper and, therefore, without consideration, . . . it does not take away other defenses, and an accommodation party may assert any defense against one not a holder in due course that he could assert against the holder's assignor, . . ."

(In the following paragraph, the quoted broad statement is qualified as to strictly personal defenses which the accommodation party might have, not here pertinent.)

This from *National City Bank* v. *Parr*, 185 N. E., 904, 906 (Indiana):

> "But we do not think that section 29 can, in the light of the other sections of the Uniform Negotiable Instruments Act, be

construed to allow a holder for value, not otherwise a holder in due course, to recover against an accommodating party."

And:

"Unless this is true, section 29 is absolutely irreconcilable with section 58 (section 11417, Burns' Ann. Ind. St. 1926), which provides that 'in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable.'"

We agree with the reasoning in Brannan, *supra*, and the Parr decision, and hold that an accommodation party is liable to one who holds the instrument as a holder for value unless in other respects it appears he is not a holder in due course.

Called to our attention is a statement in Sec. 647, 7 Am. Jur., on page 470, namely, "An accommodation maker of a note which has been discounted by a bank cannot defend payment on the ground that the bank, in discounting it, loaned in excess of the legal limit." As authority are cited *Allen* v. *First Nat. Bank*, 127 Pa., 51, 17 A., 886 and *Stephens* v. *Monongahela Nat. Bank*, 88 Pa., 157, 32 Am. Rep., 438; but in neither case is the Uniform Negotiable Instruments Law discussed, probably because the decisions antedated its enactment.

Then is this plaintiff a holder in due course?

"A holder in due course is a holder who has taken the instrument under the following conditions:

(1.) That it is complete and regular upon its face;

(2.) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

(3.) That he took it in good faith and for value;

(4.) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Sec. 52, Chap. 164, R. S. 1930.

The defendant contends that the plaintiff did not take this note "in good faith" and so is not a holder in due course. But although the single Justice made no specific findings of fact, it must be deemed

he found as a fact that the plaintiff did take this note in good faith. That finding we may not disturb, even though we would not so have found. When a trial by jury is waived and the parties submit their cause to a single Justice, "this court has nothing to do with the facts as found. Its only duty is to determine whether the law has been rightly applied to those facts as found by the judicial referee." *Kneeland* v. *Webb*, 68 Me., 540. *Reed* v. *Reed*, 70 Me., 504, 507.

> "So far as relates to the effect of the testimony, if admissible, the judgment of the justice by whom the cause was heard, is conclusive." *Haskell* v. *Hervey*, 74 Me., 192, 195.

> "In such a case it is equally well settled that, under ordinary circumstances, the judgment of the presiding Justice as to the effect of the evidence and his decision as to the matters of fact in issue, are also final and conclusive upon the parties." *Frank* v. *Mallett*, 92 Me., 77, 79, 42 A., 238, 239.

In *American Sardine Company* v. *Olsen*, 117 Me., 26, this Court on page 30, 102 A., 797 on page 799 cited with approval *Frank* v. *Mallett*, supra, and quoted this therefrom:

> "In cases heard by a judge without intervention of jury, by agreement, his findings of fact are conclusive."

Also see *State* v. *Intox. Liquors*, 102 Me., 385, on page 390, 67 A., 312, 314 in which the Court said:

> "The presiding Justice made no specific findings of fact, but his ruling as a matter of law necessarily involved certain findings of fact, which must be deemed, upon exceptions, to be true."

Likewise the question whether this note was "given to deceive a bank examiner," as claimed by the defendant, was one of fact, which now, for reasons already stated, is not subject to review.

It seems in place to notice that whether the defendant herself might have been competent to testify in such connection is not here open to consideration. *Mount Vernon Trust Co.* v. *Bergoff*, 5 N. E. (2nd), 196.

Exceptions overruled.

HOULTON TRUST COMPANY

vs.

HAZEL H. LUMBERT, EXECUTRIX.

Aroostook. Opinion, May 3, 1939.

EXECUTORS AND ADMINISTRATORS. ESTOPPEL. WITNESSES.

The statutory requirement as to presentment of claims against an estate may be waived.

The statute, though of a public nature, has for its object the protection of the rights of estates and individuals. Its provisions may therefore be waived by those for whose benefit it was passed, and who represent the interests involved.

A waiver is the intentional relinquishment of a known right.

A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. A person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of the right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it.

Waiver may be a question of fact for the jury. It is always so whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence.

Testimony of attorney for executrix that executrix was aware of nature of plaintiff's notes and voluntarily paid interest thereon was not privileged as within realm of professional confidence.

A waiver of statutory requirements for presentment of claims against estates of deceased persons can only be made within period for filing of claims.

Evidence concerning knowledge and conduct of executrix in regard to notes after statutory period for filing of claim had expired was admissible, where offered not to show subsequent waiver of requirement for filing claim, but to show acts and conduct consistent with and confirmatory of prior waiver.

On exceptions. Action by plaintiff against executrix of estate of Ansel L. Lumbert to recover money alleged to be due on promissory notes whereon testator was maker. Hearing was had before

presiding Justice without jury. Sole issue raised was upon the alleged waiver of presentment of plaintiff's claim against estate of Ansel L. Lumbert. Case comes up on exceptions by defendant to admission of evidence and to the finding and ruling that a waiver had been proved and the plaintiff was entitled to judgment. Exceptions overruled. Case fully appears in the opinion.

Bernard Archibald, for plaintiff.

Raymond S. Oakes, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. Ansel L. Lumbert, at the time of his death on March 14, 1929, was indebted to the plaintiff bank as the maker of three promissory notes, aggregating the principal sum of $25,000.00. His widow, Hazel H. Lumbert, was appointed executrix of his will by the Probate Court on April 16, 1929. Suit was brought by the plaintiff against the defendant as executrix on April 10, 1930, and within the statutory period of limitations. R. S., Chap. 101, Sec. 15.

In the writ, the plaintiff alleged compliance with the requirements of Sec. 14 of the same Chapter, which provides that,

> "All claims against estates of deceased persons, . . . shall be presented to the executor or administrator in writing, or filed in the registry of probate, supported by an affidavit of the claimant, or of some other person cognizant thereof, either before or within twelve months after his qualification as such executor or administrator."

Before trial, however, the declaration was amended by the allegation that the defendant, as executrix:

> "While the aforesaid claim set forth herein was not barred by any statutory provision as to limitation of time as to proof of claim, did duly waive the presentment and filing of the claim and cause herein declared upon."

No proof was offered in support of the original averment of compliance with the statute.

Hearing was had before the presiding Justice without a jury at the April Term, 1938. The sole issue raised was upon the alleged waiver of presentment. The case comes up on exceptions by the defendant to the admission of certain evidence bearing upon this issue and to the finding and ruling that a waiver had been proved and the plaintiff was entitled to judgment in the sum of $37,280.85 as of April 22, 1938.

The statutory requirement as to presentment may be waived.

> "The statute, though of a public nature, has for its object the protection of the rights of estates and individuals. Its provisions may therefore be waived by those for whose benefit it was passed, and who represent the interests involved." *Rawson, Admr.* v. *Knight, Admx.*, 71 Me., 99 at 105.

It is not claimed by the plaintiff that the defendant, as executrix, made any express waiver, either oral or in writing, but reliance is placed upon the conduct of the defendant as constituting a waiver. In our own decisions may be found the principles governing such waiver, and, as applicable to the facts shown by the record of this case, may be cited *Swedish-American Bank* v. *Koebernick*, 136 Wis., 473, 117 N. W., 1020:

> "A waiver is the intentional relinquishment of a known right: *Monroe W. W. Co.* v. *Monroe*, 110 Wis., 11, 85 N. W., 685. A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. And a person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of the right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it."

Again, in *Nickerson* v. *Nickerson*, 80 Me., 100 at 105, 12 A., 880 at page 882, the Court said:

> "Waiver may be a question of fact for the jury. It is always so whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence."

In the present case, the presiding Justice was clothed with jury

powers. The essential elements of the proof required are well set forth in *Hurley* v. *Farnsworth*, 107 Me., 306, 78 A., 291.

As three of the exceptions taken by the defendant were, in effect, that the finding by the court of a waiver on the part of the defendant was not supported by evidence, the record has been reviewed with care. It appears that, at the date of the decease of Mr. Lumbert, the principal sum then due upon one of the notes in suit was $15,000.00 and the rate of interest six per cent. On April 18, 1929, the executrix paid to the plaintiff bank the sum of $450.00 for six months interest upon this note, to April 15 of that year. A like amount for interest was paid by her on October 17, 1929, and again on April 1, 1930. On the second note of $5000.00 two payments were made by the executrix during the year following her appointment, which adjusted the interest to April 1, 1930. On the same dates, like interest payments were made by the executrix upon the third note of $5000.00. From this evidence alone, it is asserted by the plaintiff, the court would be warranted in finding a waiver because it showed knowledge of the executrix of the amount and nature of the claim, the interest rate, and the time when interest became due, and that the payments of interest recognized the validity of the notes as obligations against the estate. The defendant insisted that she was not personally aware of the aggregate sum owing to the plaintiff bank and simply followed the suggestions of her counsel as to the payments made.

The plaintiff went further, however, and presented for consideration the first account of the defendant, as executrix, to the Probate Court, which was dated and filed within a year, and in which she claimed to be entitled to allowance of the sums paid by her for interest. After this account had been prepared by her attorney, she submitted it to another lawyer who, after investigation, advised her that the account was properly stated.

By stipulation of counsel, it was agreed that the executrix filed on October 30, 1929 a petition for license to sell real estate, showing debts of deceased $90,000.00 and which sum included the notes of the plaintiff bank.

The attorney for the executrix, called by the plaintiff, testified that as a part of his services to his client, he procured the data as to all matters connected with the estate, including its liabilities and

assets, and gave her the information; that she was fully cognizant of the nature and amount of the notes in suit, recognized the obligation of the estate to pay interest thereon, and of her own volition made such payments. Exceptions were taken to the admissibility of this testimony and argument was based upon the reasoning of the court in *Rawson* v. *Knight*, supra, to the effect that presentation of a claim against an estate to the attorney for the estate would not bind the executrix. The evidence was not offered to prove compliance with the statute as in that case, but a waiver of it. The information possessed by the defendant concerning the matter, and her conduct in relation thereto, constituted the issue, and the plaintiff had the right to compel the testimony of her attorney upon these points. No complaint was made, and none could be, that the testimony was within the realm of professional confidence and, therefore, privileged. *Gower* v. *Emery*, 18 Me., 82. The exceptions relative to this testimony are without merit.

Such were the facts presented to the trial court as to the acts and conduct of the defendant within the period during which presentment might have been made by the plaintiff. It is true, and both sides concede, that a waiver, if any there be, must be made within such period. *Wadleigh* v. *Jordan*, 74 Me., 483; *Littlefield* v. *Cook*, 112 Me., 551, 92 A., 787.

The remaining exceptions were taken as to evidence concerning the knowledge and conduct of the executrix after the limiting period had expired.

Four exceptions were taken to the testimony of the attorney for the estate as to the knowledge of the executrix concerning the statements contained in probate petitions filed during the administration of the estate but subsequent to the time required for presentation of claims. If no evidence had been introduced of waiver within the prescribed period, then the exceptions would have been pertinent. The testimony complained of was not admissible to show subsequent waiver, but was admissible to show acts and conduct consistent with and confirmatory of prior waiver. Moreover, the reasoning of the defendant loses cogency when the record shows that all the probate documents, signed by the defendant and filed subsequently and specifying the notes in suit as claims against the estate, were offered and admitted without objection and, in fact, by

stipulation of the parties. It is the conclusion of the Court that the presiding Justice, upon competent evidence, was warranted in finding liability of the defendant.

The entry will be *Exceptions overruled.*

WILLIAM A. WEDGE *vs.* BENJAMIN BUTLER.

Androscoggin. Opinion, May 4, 1939.

FIXTURES. REFERENCE AND REFEREES.

Fixture, in law, is a term applied to a thing, originally a personal chattel, of an accessory nature, which, on being physically annexed or affixed, at least by juxtaposition, to realty, for use, has, in intention of its annexer, become part and parcel of the real estate.

Manifest intent, as indicated by proven facts and circumstances, and reasonable inferences, to incorporate the chattel into, and identify it permanently with, what is ordinarily denominated land, a word which includes not only the soil, but everything attached to it, has, in this jurisdiction, come to be recognized as the cardinal rule and most important criterion by which to determine a fixture.

A finding of fact, on the part of a referee, is, if there is any evidence in the record to sustain such finding, usually deemed binding upon the court, and not open to revision.

Judicial review of a referee's finding, obtainable where there has been reservation of the right to except, is restricted to pure questions of law.

Findings of fact by a referee, when utterly unsupported by any competent evidence, and being material to the decision, constitutes error of law.

When a report of the evidence introduced before the referee is not in the record, his finding of fact must be accepted as final.

Where the referee was not requested to report the evidence, he was under no obligation to do so.

On exceptions. Action of trover tried before referee. Decision for defendant. Plaintiff excepts to the acceptance and confirmation by the lower court of the report of the referee. Exceptions overruled. Case fully appears in the opinion.

Berman & Berman (Lewiston, Maine), for plaintiff.

Benjamin Butler, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. The case is here on exceptions to the acceptance and confirmation by the lower court, of the report of a referee of its appointment, whose decision, in an action of trover for one planer, a machine for smoothing the surface of wood, was for the defendant. The reference expressly made questions of law reviewable. Rules of Supreme Judicial Court and Superior Court, No. 42.

In this opinion, the parties will hereafter be referred to by their designations in the court below.

On November 2, 1933, plaintiff sold and delivered the planer, which he had operated in a box mill, to one Whittier; the purchaser executed to the seller, as security for the payment of the purchase money, a chattel mortgage of the property bought. That the mortgage was filed for record only in the office of the clerk of a town wherein the mortgagor did not reside, is of no present bearing.

Whittier, who, notwithstanding he had, as has been seen, incumbered the planer, apparently still lawfully had it; he, so in the bill of exceptions there is recital, installed it in a sawmill of his; the mill was erected in a building located on land in Mount Vernon, Maine, of which he, as mortgagor, was then in possession.

The machine was bolted to the mill floor, connected to a blower, and integrated, by means of belts, shafting and pulleys, with the mill.

Whether the planer was chattel or fixture was squarely at issue.

Fixture, in law, is a term applied to a thing, originally a personal chattel, of an accessory nature, which, on being physically annexed or affixed, at least by juxtaposition, to realty, for use, has, in intention of its annexer, become part and parcel of the real estate. Manifest intent, as indicated by proven facts and circumstances, and reasonable inferences, to incorporate the chattel into, and identify it permanently with, what is ordinarily denominated land, a word which includes not only the soil, but everything attached to it, has, in this jurisdiction, come to be recognized as the cardinal rule and most important criterion by which to determine a fixture. *Hayford* v. *Wentworth*, 97 Me., 347, 54 A., 940; *Portland* v. *New England Telephone etc., Company*, 103 Me., 240, 68 A., 1040; *Roderick* v.

Sanborn, 106 Me., 159, 76 A., 263; *Cumberland County Power & Light Company* v. *Hotel Ambassador*, 134 Me., 153, 183 A., 132.

To keep the record straight, it may be stated at this place that the mortgagee of the real estate is not shown to have in anywise had to do either with the transaction of the sale and purchase of the planer, or putting it into the sawmill.

The referee found, as a matter of fact, that the planer, on being set up in the sawmill, lost its character as a chattel, and merged, as a fixture, with the realty.

A finding of fact in this class of cases is, if there is any evidence in the record to sustain such finding, usually deemed binding upon the court, and not open to revision. *Hovey* v. *Bell*, 112 Me., 192, 91 A., 844; *Jordan* v. *Hilbert*, 131 Me., 56, 158 A., 853; *Hawkins* v. *Theaters Co.*, 132 Me., 1, 164 A., 628; *McCausland* v. *York*, 133 Me., 115, 174 A., 383; *Brunswick, etc., Co.* v. *Grows*, 134 Me., 293, 186 A., 705. The court, the point being urged, examines the record to ascertain if there is some competent evidence of probative force to support the finding of the referee, and does not reexamine the record for the purpose of making its own finding. Judicial review, obtainable where there has been reservation of the right to except, is restricted to pure questions of law. This is settled by so many authorities that citation is unnecessary.

The issue of fact in this case was for the referee to solve.

Having solved it, the referee concluded, as a matter of law, that, as between the litigants, i.e., the chattel mortgagee as plaintiff, and the real estate mortgagee, whose mortgage stood enforced by foreclosure, as defendant, title to the planer passed, as a fixture, to defendant, the owner of the real estate.

The decisive fact determined, the referee applied the right rule of law. *Andover* v. *McAllister*, 119 Me., 153, 109 A., 750; *Gaunt* v. *Allen Lane Company*, 128 Me., 41, 145 A., 255; *Vorsec Company* v. *Gilkey*, 132 Me., 311, 170 A., 722; *Cumberland County Power & Light Company* v. *Hotel Ambassador*, supra.

But plaintiff contends that the factual finding was utterly unsupported by any competent evidence. Finding facts material to decision absent evidence thereof constitutes error of law. *Orff's Case*, 122 Me., 114, 119 A., 67; *Paradis' Case*, 127 Me., 252, 255, 142 A., 863.

Extended discussion seems unnecessary.

Since a report of the evidence introduced before the referee is not in the record, his finding of fact must be accepted as final. There is no showing that the referee was requested to report the evidence. He was under no obligation to do so. His conclusion must be taken as the close of the case. *Plummer* v. *Stone*, 65 Me., 410.

Exceptions overruled.

CONSOLIDATED RENDERING COMPANY ET ALS.

vs.

MATTHEW W. MCMANUS, RECEIVER

OF FIRST NATIONAL BANK OF VAN BUREN.

Aroostook. Opinion, May 4, 1939.

COURTS.

The laws of the United States permit the bringing, in some instances, of suits against national banks whose affairs are being wound up, or the receivers of such banks, in state courts.

It is competent to ascertain, in a state court, the nature and extent of the interest asserted or sought to be acquired, in specific assets in the receiver's hands.

As a general rule, where the court has not jurisdiction of the cause of action or subject matter in a case, such jurisdiction cannot be conferred by consent or agreement.

On agreed statement of facts. An action by Consolidated Rendering Company, et als. against Matthew W. McManus, Receiver of First National Bank of Van Buren, to extinguish certain interests or relationships concerning particular real estate, the record title to which the bank holds, and, on transfer of the property to a trustee, to be chosen and appointed by the court, subject such property to other and different interests, relationships, and likewise incumbrances. Bill dismissed with costs. Case fully appears in the opinion.

Pendleton & Rogers, for plaintiffs.

M. P. Roberts, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. The defendant is receiver of a national bank in process of liquidation. The laws of the United States permit the bringing, in some instances, of suits against national banks whose affairs are being wound up, or the receivers of such banks, in state courts. *Allen* v. *United States*, 285 F., 678, 682; *First National Bank* v. *Pahquioque Bank*, 14 Wall., 383, 20 Law Ed., 840.

For example, it would be competent to ascertain, in a state court, the nature and extent of the interest asserted or sought to be acquired, in specific assets in a receiver's hands. *Earle* v. *Conway*, 178 U. S., 456, 20 S. Ct., 918, 44 Law Ed., 1149.

On what principle the jurisdiction in the present case is insisted, we are quite at a loss to know; the plaintiff's brief is devoted wholly to what is contended to be the merits of the controversy. But we must suppose jurisdiction is claimed on the ground that the receiver, who appeared and answered the bill, could, in a situation like this, within his competency, submit himself, in the exercise of responsibilities confided to him, to the control of the court.

As a general rule, where the court has not jurisdiction of the cause of action or subject matter in a case, such jurisdiction cannot be conferred by consent or agreement. *State* v. *Bonney*, 34 Me., 223; *Powers* v. *Mitchell*, 75 Me., 364.

The ruling purpose of the instant proceeding was to extinquish certain interests or relationships concerning particular real estate, the record title of which the bank holds, and, on transfer of the property to a trustee, to be chosen and appointed by this court, subject such property to other and different interests, relationships, and likewise incumbrances. That is not permissible. *Earle* v. *Pennsylvania*, 178 U. S., 449, 20 S. Ct. 915, 44 Law Ed., 1146; *Earle* v. *Conway*, supra.

The bill alleges no ground for the exercise of the equitable jurisdiction of the court.

The bill is dismissed with costs.

It is so ordered.

BERTRUM E. DELONG *vs.* MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion May 24, 1939.

COMMERCE. MASTER AND SERVANT. RAILROADS.

Question of whether injured railroad employee was in interstate commerce within Federal Employers' Liability Act, when material facts were undisputed, is for the court.

When Federal Employers' Liability Act, U. S. C. A., Title 45, Sec. 51 is concerned, it supersedes all state laws, and state statutes previously operative yield to its paramount and exclusive power, but the governing law as to evidence and procedure is that of the forum.

Under the Federal Employers' Liability Act, U. S. C. A., Title 45, Sec. 51, the employer and employee, at the time of the injury, must be in interstate business, or in work so closely related to transportation of this sort, or so directly connected with it, as substantially to form a part of it.

When acts of employee have direct relationship to both kinds of commerce, the Federal Statute applies.

Work done to keep a subsisting railway, its structures, and equipment, in a safe state for interstate traffic, or to maintain and improve that state, comes within the Federal Employers' Liability Act.

On exceptions. Plaintiff seeks recovery for personal injuries sustained while employed by defendant corporation. Applicability of Federal Employers' Liability Act, U. S. C. A., Title 45, Sec. 51, is decisive question. Presiding Justice directed non-suit. Plaintiff excepted. Exceptions overruled. Case fully appears in the opinion.

Peter A. Isaacson,

Ernest L. Goodspeed, for plaintiff.

Perkins & Weeks, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. The plaintiff excepts to the direction of a non-suit. A decisive question is the applicability of the Federal Employers' Liability Act, U. S. C. A., Title 45, Sec. 51. If applicable, the action is not sustainable because not seasonably commenced. *Idem*, Sec. 56.

The facts material to the issue seem to be undisputed and consequently, "whether the injured servant was in interstate commerce is for the court." *Hatch* v. *Terminal Company*, 125 Me., 96, 102, 131 A., 5, 8.

The plaintiff, employed by the defendant as clerk, janitor, and telegrapher at its station in South Gardiner, fell from a stepladder then used in installing a fuse in an electric light circuit. This circuit conducted electricity to lights in the various rooms of the station, on its platform, and particularly, so far as this case is concerned, to a bulb that illuminated three lenses — green, red, and yellow — in a "semaphore train order signal." Hand-operated from the office by the plaintiff or Mr. Harris, the station agent, the function of this device was to transmit train orders. The lenses and movable arms were so employed. Green indicated "Proceed," yellow, "Proceed cautiously," and red, "Stop." The bulb, lighted from sunset to sunrise, enhanced the brilliancy of the colored lenses so that they could be seen the better from afar and thus the order be earlier received. A tell-tale light in the office indicated any failure of the bulb to function.

That day the plaintiff had been working from 11:30 A. M. to 7:30 P. M. As he was about to leave for home (the station agent not there), in turning off the light over the desk in the office, he "blew the fuse" in the baggage room. This caused all lights on the circuit to go out. To relight, he had just put the new fuse in when he fell.

South Gardiner was a day station only, open for business from 5:30 o'clock in the morning to 7:30 o'clock at night. The agent himself was on duty in the morning to 1:30 o'clock in the afternoon, and the plaintiff, his assistant, from 11:30 A. M. to 7:30 P. M.

It is conceded that three interstate trains were to pass that night. It is admitted that the defendant at the time of the accident was engaged in interstate commerce and that the signal served both interstate and intrastate commerce.

The contention of the plaintiff is that at the time he received his

injuries, his act was "without commerce," while the defendant insists it was one of interstate commerce.

The federal act provides in part:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . ."

When this statute attaches, it "supersedes all State laws." *Hatch* v. *Terminal Company*, supra, on page 99. "State statutes previously operative" yield "to its paramount and exclusive power." *Corbett* v. *Boston & Maine Railroad*, 219 Mass., 351, 356, 107 N. E., 60, 62; *Lynch* v. *Boston & Maine Railroad*, 227 Mass., 123, 126, 116 N. E., 401. But the governing law as to evidence and procedure is that of the forum. *Grant* v. *Express Company*, 126 Me., 489, 490, 139 A., 784.

Throughout the country reported cases, almost without number, both federal and state, have dealt with this statute, but in most, if not in all, the test applied is: Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically part of it? Our Court in *Hatch* v. *Terminal Company*, supra, thus expressed it:

> "At the time of the injury, the employer and employee must be in interstate business, or in work so closely related to transportation of this sort or so directly connected with it, as substantially to form a part of it."

Also see *Saunders* v. *Boston & Maine Railroad*, 287 Mass., 56, on page 59, 191 N. E., 381, and many cases cited in 10 A. L. R., 1184 *et seq.*

The test agreed upon, the chief difficulty lies in its application to the facts in a given case. Some work performed by the employee is held to be too remote, as in *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S., 556 (1916), 36 S. Ct., 188 (putting up fixtures in railroad machine shop); *Killes* v. *Great Northern Ry.* (Wash.), 161 P., 69 (1916) (building scaffold for painting freight shed); *Dunn* v. *Missouri Pac. Ry. Co.* (Mo.), 190 S. W., 966 (1916) (riveting stovepipe for stove to be used in roundhouse); *Castonguay* v. *Grand*

Trunk Ry. (Vt.), 100 A., 908 (1917) (repairing roundhouse wall); *Benson* v. *Bush* (Kans.), 178 P., 747, 10 A. L. R., 1165 (1919) (starting fire in depot stove); *Industrial Commission* v. *Davis*, 259 U. S., 182 (1922), 42 S. Ct., 489 (overhauling locomotive in general repair shops); *Sullivan* v. *New York, N. H. & H. R. Co.* (Conn.), 134 A., 795 (1926) (turning off station lights); *Fears* v. *Boston & M. R. R.* (N. H.), 166 A., 283 (1933) (breaking down frozen crust at top of contents of coal chute); *Gasser* v. *Central R. Co. of New Jersey* (Pa.), 171 A., 97 (1934) (sweeping platform); *Los Angeles & S. L. R. Co.* v. *Industrial Accident Com'n* (Cal.), 43 P. (2d), 282 (1935) (constructing detour in power line); *Furferi* v. *Pennsylvania R. Co.* (N. J.), 180 A., 405 (1935) (unloading ties for storage); and *Clevinger* v. *St. Louis-San Francisco Ry. Co.* (Mo.), 109 S. W. (2d), 369 (1937) (cutting weeds), while other work, not too remote, as in *Pedersen* v. *Del., Lack. & West. R. R.*, 229 U. S., 146 (1913), 33 S. Ct., 648 (carrying bolts or rivets to bridge); *Eng* v. *Southern Pac. Co.*, 210 Fed., 92 (1913) (constructing new office in freight shed); *Grow* v. *Oregon Short Line R. Co.* (Utah), 138 P., 398 (1914) (block system); *Cincinnati, N. O. & T. P. Ry. Co.* v. *Bonham* (Tenn.), 171 S. W., 79 (1914) (performing duties as signal man); *Thompson* v. *Cincinnati, N. O. & T. P. Ry. Co.* (Ky.), 176 S. W., 1006 (1915) (carpentering on extension to repair shops); *Ross* v. *Sheldon* (Iowa), 154 N. W., 499 (1915) (putting additional cross-arms on poles in signal system); *Coal & Coke Ry. Co.* v. *Deal*, 231 Fed., 604 (1916) (replacing defective telegraph and telephone poles); *Grand Trunk Ry. Co.* v. *Knapp*, 233 Fed., 950 (1916) (carpenter on way to repair bridge); *Collins* v. *Michigan Cent. R. Co.* (Mich.), 159 N. W., 535 (1916) (stringing wires on poles); *Southern Pac. Co.* v. *Industrial Accident Commission* (Cal.), 161 P., 1142 (1916) (flagging electric train); *Roush* v. *Baltimore & O. R. Co.*, 243 Fed., 712 (1917) (operating pumping station); *Lynch* v. *Boston & Maine Railroad*, 227 Mass., 123, 116 N. E., 401 (1917) (employee crossing track to receive mail); *Louisville & N. R. Co.* v. *Mullins' Adm'x* (Ky.), 203 S. W., 1058 (1918) (signalman going home in tricycle furnished by railroad); *Brier* v. *Chicago, R. I. & P. Ry. Co.* (Iowa), 168 N. W., 339 (1918) (about to straighten poles); *New York Cent. R. R. Co.* v. *Porter*, 249 U. S., 168 (1919),

39 S. Ct., 188 (shovelling snow from tracks); *Culp* v. *Atlantic City R. R.* (N. J.), 110 A., 115 (1919) (painting baggage room); *So. Pac. Co.* v. *Industrial Accident Comm.*, 251 U. S., 259 (1920), 40 S. Ct., 130 (wiping insulators); *Delaware, L. & W. R. Co.* v. *Busse*, 263 Fed., 516 (1920) (repairing a pier shed door); *Stiedler* v. *Pennsylvania R. Co.* (N. J.), 109 A., 512 (1920) (painting a pole used in electric railroad operation); *Saxton* v. *El Paso & S. W. R. Co.* (Ariz.), 188 P., 257 (1920) (installing block system); *Erie R. R. Co.* v. *Collins*, 253 U. S., 77 (1920), 40 S. Ct., 450 (running gasoline engine to pump water into tank); *Charlotte Harbor & N. Ry. Co.* v. *Truette* (Fla.), 87 So., 427 (1921) (injury to telephone repairer on duty going to work); *Phila. & Read. Ry. Co.* v. *Di Donato*, 256 U. S., 327 (1921), 41 S. Ct., 516 (struck by train while flagging); *Phila. & Read. Ry. Co.* v. *Polk*, 256 U. S., 332 (1921), 41 S. Ct., 518 (caught and killed between cars); *Halley* v. *Ohio Valley Electric Ry. Co.* (W. Va.), 114 S. E., 572 (1922) (installing a new rotary converter and transformer); *Bauchspies* v. *Central R. Co. of New Jersey* (Pa.), 135 A., 728 (1927) (performing duty as caretaker of switches, signals, batteries, etc.); *Chesapeake & O. Ry. Co.* v. *Russo* (Ind.), 163 N. E., 283 (1928) (performing duty as water boy to crew of track repairmen); *Texas & Pac. Ry. Co.* v. *Kelly* (Texas), 35 S. W. (2d), 749 (1930) (installing signal system); *Steward* v. *Industrial Commission of Utah* (Utah), 15 P. (2d), 334 (1932) (recharging batteries in block system); *Bennor* v. *Oregon-Washington R. & Nav. Co.* (Wash.), 27 P. (2d), 1082 (1933) (assistant cook to repair gang injured while carrying beef to boarding cars of work train); and *Lynch* v. *Central Vermont Ry.* (Conn.), 185 A., 569 (1936) (crossing tender killed while proceeding to set semaphores).

Some acts have direct relationship to both kinds of commerce; nevertheless, the federal statute applies. As stated in *Saunders* v. *Boston & Maine Railroad*, supra, on page 59, 191 N. E., on page 382:

> "In *Philadelphia & Reading Railway* v. *Di Donato*, 256 U. S., 327, the employee was a flagman signalling both intrastate and interstate trains. It was said that the 'service of a flagman

concerns the safety of both commerces [interstate and intrastate] and to separate his duties by moments of time or particular incidents of its exertion would be to destroy its unity and commit it to confusing controversies.'"

In *Bauchspies* v. *Central R. Co. of New Jersey*, supra, the court said:

"The fact that the facility which deceased helped to maintain was used to further both kinds of commerce would not make it presumptively an instrument of intrastate, as against interstate, transportation; on the contrary, the presumption is rather the other way. . . . 'If there is an element of interstate commerce in a traffic or employment, it determines the remedy of the employee.'"

In some of the cited cases a distinction is drawn between acts constituting repair or maintenance of a device in operation and new construction prior to use.

In *Steward* v. *Industrial Commission of Utah*, supra, it is stated on page 335:

"In applying the test specifically to facts similar to those in the case at hand, the rule adopted is that an employee is employed in interstate commerce when making repairs, working upon, or keeping in usable condition instrumentalities used in interstate commerce."

Also in *Coal & Coke Ry. Co.* v. *Deal*, supra, on page 607:

"It is a matter of common knowledge that in order to successfully operate a railroad it is essential that a carrier should have a well-equipped telegraph or telephone line constructed and maintained near to and parallel with its tracks, so as to enable its train dispatchers to transmit train orders and thereby keep the engineers and conductors properly advised as to the relative positions of the respective trains. Under these circumstances a telephone or telegraph line is just as essential to the practical operation of the road as the track or any other particular part of the road's equipment."

Here the effect of putting in the new fuse was to re-establish efficiency in this device temporarily incapacitated. Without a working fuse, it was deficient; with it, efficient. The plaintiff cured the defect as one would who had installed a new spark plug in a gasoline engine in place of one old and worn out. It was not new construction. The new fuse in, it was the same device working as an entity as formerly it had for the protection of both kinds of commerce. See *Ross* v. *Sheldon*, supra, on page 501. Also *Steward* v. *Industrial Commission of Utah*, supra, where the workman's duty was to take out, recharge, and put back batteries in a block signal system.

> "There can be no serious question that the work of installing and removing the batteries from their position along the railroad tracks would be interstate in character. . . . An employee who is required to keep in repair electric signals and to direct and control the operation of intrastate and interstate trains on an interstate railroad is engaged in interstate commerce." *Steward* v. *Industrial Commission of Utah*, supra, on page 335 and 336.

Work done to keep a subsisting railway, its structures, and equipment, in a safe state for interstate traffic, or to maintain and improve that state, comes within the Federal Employers' Liability Act. *Boyer* v. *Pennsylvania R. Co.* (Md.), 159 A., 909.

As said in 12 C. J. on page 48:

> "Where repair work is a part of interstate commerce, all minor tasks which form a part of the larger one are likewise interstate commerce so as to make a person engaging in them engaged in interstate commerce." Also see *Pedersen* v. *Delaware, etc., R. Co.*, supra.

But the plaintiff, claiming his act was wholly "without commerce," relies in particular on *Sullivan* v. *New York, N. H. & H. R. Co.*, supra, in which it was held that a railroad station clerk, killed by electric current while turning off station lights, was not engaged in interstate commerce. There the circuit had lights in the waiting room, the toilet, and on the station platforms. The lighting of a train signal device, however, was not involved. There, when

the plaintiff was killed, it happened at a time when the station was closed to the public and when the electric current was not being made use of for commerce of either kind. Here, while it is true that the installing of this fuse would make possible the lighting of the station itself and its premises, it would also make possible the use of the device during the night for both interstate and intrastate commerce. The court in the *Sullivan Case*, supra, said on page 799:

> "It is apparent that the turning off of the electric light, which was used merely as a convenience at the station after dark, was not a piece of work which participated in any way in the movement of interstate transportation, and, since the day's work was then at an end, could not then have been so closely related to it as to be practically part of it."

That language is not pertinent to the facts in this case. Here, continued use of the current would serve both commerces as well in the night as during the day.

It is contended, however, that no operator would be present to give train orders during the night. But it appeared that the device had its use even in the absence of the operator. If for any reason it were desired to stop a train after the closing of the station, the operator, before leaving, could give that order by employment of the lighted red lens and the horizontal arm.

If a train at night came to a day station whose signal light was out, the engine crew were required to report that fact at the next regular stop. The replacement of the old fuse with the new obviated the necessity of making such a report. Besides, to an approaching locomotive engineer, the lack of light on the lens at night would be noticeable and there would be a tendency to slow down, if not stop, to ascertain the cause of the defective signal.

While the plaintiff testified that he put this fuse in so that the station could be lighted when the station agent arrived in the morning, and did not say he put it in so as to light the signal system during the night, yet his purpose is not a decisive factor as to whether he was then engaged in interstate commerce. That with which we are concerned is the effect of his act, not his intention. However, as a matter of fact, at that time of year there was a long period of darkness following the arrival of the station agent in

the morning, when the device would be operable with light while the station was open as a day station.

In conclusion, the facts herein compel us to hold that the plaintiff at the time of his injury was "engaged in interstate transportation, or in work so closely related to it as to be practically part of it." The application of the recognized test prevents recovery.

Exceptions overruled.

FERRY BEACH PARK ASSOCIATION

OF THE UNIVERSALIST CHURCH

vs.

CITY OF SACO.

York. Opinion, July 13, 1939.

TAXATION. CORPORATIONS.

In accordance with legal principles, and the interpretation of the statute as enunciated by our Court, provisions of R. S., Chap. 13, *Sec.* 6, *Subdivision III, is subject to the limitation that the exemption applies only to property occupied by the corporation for its own purposes.*

Immunity from assessment depends, not upon simple ownership and possession of property, nor necessarily upon the extent, or length, of the actual occupancy thereof, although this is entitled to consideration, but upon exclusive occupation of such a nature as, within the meaning of the statute, contributes immediately to the promotion of benevolence and charity, and the advancement thereof.

Appeal on report. Case originated as a petition for abatement of taxes assessed against the plaintiff appellant by the City of Saco. Upon refusal of abatement, appeal was taken to the Superior Court and the case comes forward on report. Appeal sustained. Judgment accordingly. Case fully appears in the opinion.

Robinson & Richardson, for appellant.
Philip E. Graves,
Francis W. Sullivan, for appellee.

SITTING: STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. This case originated as a petition for abatement of taxes assessed against the plaintiff appellant by the City of Saco. for the years 1937 and 1938 on an aggregate valuation of its property of $18,875, the tax being $906 for each year. Upon refusal of abatement, appeal was taken to the Superior Court and the case comes forward on report.

The plaintiff is a corporation, without capital stock, organized under R. S., Chap. 70, Sec. 1, which authorizes, among other things incorporation for literary, charitable, educational, social, moral, religious or benevolent purposes.

Plaintiff claims exemption from taxation under the provisions of R. S., Chap. 13, Sec. 6, Subdivision III, exempting "the real and personal property of all benevolent and charitable institutions incorporated by the state." In accordance with legal principles, and the interpretation of the statute as enunciated by our Court, this is subject to the limitation that the exemption applies only to property occupied by the corporation for its own purposes. *Auburn* v. *Y. M. C. A.*, 86 Me., 244, 29 A., 992.

The plaintiff is successor corporation, with slight variation in name, to a corporation whose like claim for exemption was considered by this Court in *Ferry Beach Park Assn. of Universalists* v. *City of Saco*, 127 Me., 136, 142 A., 65, 66. The fundamental reasoning of the opinion in that case, buttressed by former decisions of our Court, furnishes a clear guide to the determination here. This predecessor corporation was there found to be a "benevolent and charitable institution incorporated by the state," and its property, occupied for its own purposes, to be exempt from taxation. The difficulty encountered upon the record in that case was the failure to show whether certain property was so used, and the finding that other specified property was not thus occupied. Property found to be definitely devoted to the purposes of the Association, was held to be exempt.

In 1936 the present corporation was formed. Certain basic changes appear in the statement of corporate purposes, eliminating therefrom anything which, in the former corporation, might have appeared to authorize the conduct of a business for profit. Its certificate of incorporation provides:

> "The purposes of the corporation are religious and educational, to wit: generating of missionary power throughout the Universalist Church; and in furtherance thereof the carrying on of religious and educational institutes, lectures and concerts, the conducting of religious services and public observances for the development of moral and religious character; and as incident thereto, for its own purposes, as above set forth, to provide, without pecuniary profit, lodging and boarding accommodations for the comfort, convenience, health, safety and welfare of its members in attendance at and in connection with such institutes, lectures, concerts, services and observances; provided, however, that the corporation is to hold, maintain and occupy its property wholly for its own religious and educational purposes as above set forth."

Further, the present corporation does not hold title to certain parcels of real estate which the predecessor Association owned, and which were not devoted to the purposes for which it was organized.

Again, the scope of its activities are clearly defined in the present record. It is shown that a series of "institutes," as they are called, continuing through July and August, are more varied than those considered in the earlier case, but serve to emphasize its objective of developing "missionary power throughout the Universalist Church." It is made still more certain that the present corporation, like the one which it succeeded, operates "in substantial accord with the purposes for which it was given charter. Primarily it is a Missionary Society, carrying on along lines of its own election, the diffusion and inculcation of the Christian religion." *Park Assn.* v. *Saco*, supra.

In *Camp Emoh Associates* v. *Lyman*, 132 Me., 67, 166 A., 59, 61, the Court points out:

> "Immunity from assessment depends, not upon simple ownership and possession of property, nor necessarily upon

the extent, or length, of the actual occupancy thereof, although this is entitled to consideration, but upon exclusive occupation of such a nature as, within the meaning of the statute, contributes immediately to the promotion of benevolence and charity, and the advancement thereof."

The record in this case preponderantly and fairly supports the contention of the plaintiff that all its property is exclusively devoted to the purposes for which it was organized, and that within the purview of our decisions it is a benevolent and charitable institution. *Baptist Missionary Convention* v. *Portland*, 65 Me., 92; *Prime* v. *Harmon*, 120 Me., 299, 113 A., 738; *Park Assn.* v. *Saco*, supra.

Opposing argument by counsel for the City of Saco, relative to the work of the Association and the claim that it is of a business character, is not substantiated by the facts as they appear of record.

There is also insistence that the Association is purely a religious corporation and must be governed as to exemptions by the provisions of R. S., Chap. 13, Sec. 6, Subdivision V. As this exemption applies only to houses of religious worship and parsonages, it is urged that consequentially there is no exemption here. A careful review of the cases cited as to distinctions between religious, benevolent and charitable societies, including *Bangor* v. *Masonic Lodge*, 73 Me., 428; *Foxcroft* v. *Campmeeting Assn.*, 86 Me., 78, 29 A., 951; *Doyle* v. *Whalen*, 87 Me., 414, 32 A., 1022, indicates no real conflict with the decisions in support of our present holding.

Under the terms of the stipulation and report, the Law Court is to render such judgment as the legal rights of the parties require. The plaintiff, being appellant from the decision of the assessors to the Superior Court, the mandate will be

Appeal sustained.
Judgment accordingly.

MELVIN F. MCFARLAND, COLL. *vs.* RALPH E. MASON.

Hancock. Opinion, July 17, 1939.

TAXATION.

In considering application of R. S. 1930, *Chap.* 13, *Sec.* 29, *heed must be given to conditions which existed at the time of its enactment and to the end which the legislature sought to gain in providing a special method for the taxation of "sailing vessels."*

It is apparent that the statute does not include within its terms all vessels. The word is not used in its broadest sense. The statute applies only to "sailing vessels and barges."

On report. Action of debt brought by the collector of taxes of the City of Ellsworth to recover taxes assessed against the defendant, an inhabitant of Ellsworth, on certain personal property. In accordance with the stipulation, judgment is to be entered for the plaintiff in the sum of $118.73 with interest from July 1, 1935 on the sum of $70.13, and interest from August 1, 1936 on the sum of $48.60. So ordered. Case fully appears in the opinion.

Blaisdell & Blaisdell, for plaintiff.

Ralph E. Mason, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. This is an action of debt brought by the collector of taxes of the City of Ellsworth to recover taxes assessed against the defendant, an inhabitant of Ellsworth, on certain personal property for the years 1935 and 1936. It is before this Court on report. The only matter in controversy is the assessment on a boat owned by the defendant.

The defendant was the owner of a private yacht not rebuilt, nor repaired as such terms are defined in R. S. 1930, Chap. 13, Sec. 30. This boat was thirty-three years old and of a gross tonnage of twenty-one tons and was enrolled under the laws of the United

States. It was propelled by sails but had an auxiliary gasoline motor which was used occasionally. It was assessed as the property of the defendant in the sum of $900.00 under the provisions of R. S. 1930, Chap. 13, Sec. 14.

The defendant claims, however, that the boat was a "sailing vessel" as that term is used in R. S. 1930, Chap. 13, Sec. 29, and that it should have been taxed at an appraised value of $3.00 a ton as therein provided. This section reads as follows:

> "All sailing vessels and barges registered or enrolled under the laws of the United States or foreign governments, owned wholly or in part by inhabitants of this state, shall be taxed upon an appraised value of twenty dollars a ton, gross tonnage, for new vessels and barges completed on or before the first day of April of each year. Vessels or barges one year old or more shall be reduced in value at the rate of one dollar a ton a year for each additional year of age, until they shall have reached the age of seventeen years, at and after which time said vessels and barges shall be taxed upon an appraised value of three dollars a ton, gross tonnage. The provisions of this section shall not apply to steam barges."

We are aware that in many instances the word "vessel" has been used in its generic sense and has been construed to include practically all craft used in navigation larger than open boats propelled by oars or paddles. For example, a motor boat used for pleasure has been held to be a vessel within the meaning of the federal statute (46 U. S. C. A., Sec. 183) limiting the liability of the owner of a vessel. *Warnken* v. *Moody*, 22 F. (2d), 960. It has also been held in Massachusetts that a pleasure yacht seventy-one feet long and of twenty-two tons burden is a "ship" or "vessel" and taxable as such to its owner in the town where he is an inhabitant. *Barker* v. *Inhabitants of Fairhaven*, 265 Mass., 333, 163 N. E., 901. There are other cases of similar import.

But in considering the statute claimed by the defendant to be applicable here we must give heed to conditions which existed at the time of its enactment and to the end which the legislature sought to gain in providing a special method for the taxation of "sailing vessels."

Furthermore, it is apparent that the statute does not include within its terms all vessels. The word is not used in its broadest sense. The statute applies only to "sailing vessels and barges." The boat here in question was certainly not a barge nor was it, though propelled with sails, what is commonly known as a sailing vessel. A sailing vessel was a rather well-known object in our harbors a generation ago, and to the seafaring men of our coast was a craft quite different from the pleasure boats which now gaily pursue their way under summer skies and gentle breezes.

A reading of our statutes indicates that the word "vessel" is often used in a specific and not in a generic sense. For example, in describing the offense of cutting loose or injuring boats the legislature uses the words "any vessel, gondola, scow or other boat." R. S. 1930, Chap. 139, Sec. 14. R. S. 1930, Chap. 139, Sec. 15, as amended, provides a penalty for mooring "a vessel, boat, scow, etc." to any buoy or beacon. There are other similar examples, and in other instances it is apparent that the word "vessel" is used in its broadest sense.

Most important of all, however, is the fact that in the statute under which the tax in question purports to have been laid providing for the taxation of personal property to the owner in the town where he is an inhabitant on April 1 (R. S. 1930, Chap. 13, Sec. 14) there is an exception (Sec. 15, Par. II) of yachts and pleasure vessels owned by non-residents, which under the provisions of the statute are taxed to the owners in the place where such property is on April 1 of each year. What is the purpose of the exception in Section 15 if it was not the intention to tax "yachts and pleasure vessels" under the provisions of Section 14?

We are satisfied that the defendant was not entitled to have this boat assessed under the provisions of R. S. 1930, Chap. 13, Sec. 29, as a "sailing vessel."

This conclusion renders it unnecessary to consider the other claims made by the plaintiff in its brief. In accordance with the stipulation judgment is to be entered for the plaintiff in the sum of $118.73 with interest from July 1, 1935 on the sum of $70.13, and interest from August 1, 1936 on the sum of $48.60.

So ordered.

LINA VAN WOUDENBERG *vs.* DOROTHY LOUISE VALENTINE.

Lincoln. Opinion, July 20, 1939.

TAXATION.

Tax sales are subject to defeasance by redemption of the property within two years.

Sales for default in taxes must rightly adhere to statutory requirements. Those requirements, being designed for the security of property owners, or for their benefit, are mandatory and not directory.

A conveyance of real estate for nonpayment of taxes is, in general, for an inadequate consideration, on ex parte *proceeding, and against the will of the land owner.*

Town clerk's failure to record the copy of notice and collector's certificate is fatal to validity of tax collector's deed.

To support a tax title, the observance of all statute conditions is indispensable. To prevent a forfeiture, strict construction is not unreasonable.

A record by the town clerk of the tax collector's copy of his newspaper notice of the contemplated sale, and of his certificate, is, by statute, an essential necessity to make the tax sale valid.

On exceptions. A real action on plea of general issue. Case heard before presiding Justice, without intervention of jury, involving the question of the highest right or best title to the land. Plaintiff predicated her claim to the legal title. Judgment for the plaintiff. Exceptions by defendant. Exceptions overruled. Case fully appears in the opinion.

Alan L. Bird, for plaintiff.

Abraham Breitbard,

Wilfred E. Diamond, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. In this real action, the plea was the general issue. A hearing in vacation before a judge, no jury participating, (R. S., Chap. 96, Sec. 39, as amended by P. L. 1933, Chap. 14,) involved the question of the highest right or best title to the land. Plaintiff predicated her claim to the legal title. Judgment went for her.

The first question on exceptions by defendant is whether a sale, and an eventually delivered deed purporting to evidence the conveyance of certain real estate for unpaid delinquent taxes, effected a divestment of the original title to the property.

The levy and assessment was of April 1, 1932, in Bremen, against owners nonresident in the town. The collector, in selling and deeding, proceeded under Revised Statutes, Chapter 14, Section 72, *et seq.*

The auction was on February 6, 1933. The bid of the town, $20.77, a sum exactly totaling the amount of the taxes and accrued costs, for the whole estate, was successful. The premises were struck off, accordingly.

Tax sales are subject to defeasance by redemption of the property within two years. R. S., Chap. 14, (*supra*), Sec. 80, as amended by P. L. 1933, Chap. 205. This privilege, conferred by, and not existing independently of statute, was not here asserted.

The town quitclaimed its title. Intermediate deed, dated June 23, 1937, and duly recorded, brought that title to defendant.

Plaintiff's title is derived from the true owners. Her deed is subsequent, as respects both the time of its execution and of its record, to defendant's deed.

Sales for default in taxes must rightly adhere to statutory requirements. Those requirements, being designed for the security of property owners, or for their benefit, are mandatory and not directory. *Whitmore* v. *Learned*, 70 Me., 276, 278; *United, etc., Company* v. *Franks*, 85 Me., 321, 322, 27 A., 185; *Roberts* v. *Moulton*, 106 Me., 174, 176, 76 A., 283. A conveyance of real estate for nonpayment of taxes is, in general, for an inadequate consideration, on *ex parte* proceeding, and against the will of the land owner. *French* v. *Patterson*, 61 Me., 203, 210; *Whitmore* v. *Learned*, supra.

Of controlling importance in the present inquiry is a statute

provision that, before offering nonresident owned real estate for sale for tax delinquency, tax collectors shall, additionally to previous newspaper notice of the time and place of, (except the taxes be sooner paid,) the intended selling and other details, "lodge with the town clerk a copy of each such notice, with his (i.e., the collector's) certificate thereon that he has given notice of the intended sale as required by law." The statute continues: "Such copy and certificate shall be recorded by said clerk and the record so made shall be open to the inspection of all persons interested." R. S., Chap. 14, Sec. 72.

There is, on the record, no dispute that the tax collector, in his effort to enforce collection of a valid tax, punctiliously followed statute prescription. The town clerk, although he indorsed on the copy and certificate the words: "received and recorded," never did register the copy and the certificate in the sense of actually spreading them of record. At the trial below, the registering official produced the copy and the certificate, neither of which had been recorded.

The clerk's failure to record the copy and the certificate must be held fatal to validity of the tax collector's deed. See, as affording a rule for guidance in the present instance, *Stafford* v. *Morse*, 97 Me., 222, 54 A., 397. There, a statute required, on foreclosure of a real estate mortgage by publication, that a copy of the printed notice and the name and date of the newspaper in which it was last published be recorded in the office of the register of deeds, within thirty days after the last publication. A certificate of a register as to such record was not dated, and there was no record evidence that the printed notice was seasonably recorded. The foreclosure was held ineffectual. Nor was the record amendable after the thirty days had elapsed. *Stafford* v. *Morse*, supra.

To support a tax title, the observance of all statute conditions is indispensable. To prevent a forfeiture, strict construction is not unreasonable. *Cressey* v. *Parks*, 76 Me., 532; *Baker* v. *Webber*, 102 Me., 414, 67 A., 144.

Indorsement upon the copy and certificate of "received and recorded" was of no legal efficacy. That, in and of itself, did not make a record "open to the inspection of all persons interested." The

realty owner, for one, was not afforded a source of information respecting his own situation; the record, as to him, was only a blank page.

True, a chattel mortgage is "considered as recorded when received." A statute defines that it shall be so regarded. R. S., Chap. 105, Sec. 2. No specific legislative declaration similar in tenor applies to tax collectors' copies and certificates.

The defendant seeks to supply the want of a town clerk's record by force of procedural legislation, which lays down, in gist, that in the trial of any action involving the validity of a sale of real estate for nonpayment of taxes, it should, in the first instance, be sufficient for the party claiming under the sale to produce in evidence the collector's deed, duly executed and recorded.

Further, the statute is, in effect, that if the primary evidence of title be contradicted or overcome by other evidence, the tax-deed owner should, on the introduction into the evidence of the original assessment, signed by the assessors, and their warrant to the collector, and the making of proof that the tax collector, in selling the real estate, complied with the statutes, — be entitled to judgment in his favor. R. S., Chap. 14, (*supra*,) Sec. 87.

It is sufficient to say that, in the present instance, the line of argument extends to the inevitable end of the imperfection of the neglect or failure of the town clerk to record the collector's copy and his certificate.

The Legislature did not assume to treat a failure of the town clerk to record the collector's copy and certificate as in no wise affecting the integrity of a sale. That the section was not purposed to have such office is patent on reading its concluding words:

". . . and in all such actions involving the validity of sales made after the twenty-sixth day of April, eighteen hundred and ninety-five, the collector's return to the town clerk, the town clerk's record, or, if lost or destroyed, said clerk's attested copy of such record, . . . shall be prima facie evidence of all facts therein set forth."

A record by the town clerk of the tax collector's copy of his newspaper notice of the contemplated sale, and of his certificate, is, by statute, an essential necessity to make the tax sale valid.

This is the only question necessary to a decision of this case. There need, therefore, here be no separate discussion of exceptions

to a ruling that the tax deed was not shown to have been "duly executed."

Whether Revised Statutes, Chapter 14, Section 72, in its language: "For any irregularity, informality, or omission in giving notice as required by this section, and in lodging copy of the same with the town clerk, the collector shall be liable to any person injured thereby," would afford this plaintiff a right of action as against the tax collector for the town clerk's failure to record the copy of the notice that had been lodged with him, a matter of suggestion in argument, is not at this time open to consideration. In any event, the provision neither excuses nor militates against recording the notice.

Exceptions overruled.

CUMBERLAND COUNTY POWER & LIGHT COMPANY, PLAINTIFF

vs.

BENJAMIN M. GORDON, DEFENDANT.

York. Opinion, July 21, 1939.

PARTNERSHIP.

At common law the voluntary assignment of the interest of any member of a partnership at will worked a dissolution.

Section 4 of Chap. 44, R. S. 1930, does not mean that the retiring partner is conclusively presumed to be liable for every debt that the remaining members of the partnership may thereafter contract. The effect of the conclusive presumption in the absence of estoppel is limited to such obligations as could have been lawfully contracted by the partnership had there been no withdrawal of the partner.

A partnership is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business with the understanding that there shall be a community of profits thereof between them.

A partnership is founded in the voluntary contract of the parties as distinguished from the relations which may arise between the parties by mere operation of law independent of such contract. The contract may be either oral or in writing and for no definite length of time.

During the continuance of a general or commercial partnership each member has a right to bind his associates to the performance of every contract he may make in the name of the firm, within the limits allowed by the articles of association; but he can not bind it by any contracts beyond those limits.

A retiring partner sustains no relation to the remaining members which actually authorizes them to bind him, and whenever a retiring partner is held liable for the debts of the continuing partners, the liability is based on principles of estoppel.

The fact of the failure to file the withdrawal certificate would not constitute an estoppel in favor of the plaintiff in this case.

Without the consent of a retired partner, the remaining partners can not enlarge the scope of the original business and thus, against his will, make him a party to a different contract.

On exceptions to acceptance of Referee's report. Plaintiff sues to recover compensation for "electric light and cooking service" and balance of purchase price for sale of certain restaurant equipment. As to both, the Referee reported for the plaintiff. Defendant filed exceptions to acceptance of Referee's report. Exceptions sustained. Case fully appears in the opinion.

John S. S. Fessenden, for plaintiff.

Brooks Whitehouse,

Berman & Berman (Lewiston, Maine), for defendant.

SITTING: DUNN, C. J., BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. On defendant's exceptions to acceptance of Referee's report.

The plaintiff sues to recover compensation for "electric light and cooking service" and balance of purchase price for sale of certain restaurant equipment. As to both, the Referee reported for the plaintiff.

Late in 1934 or early in 1935, the defendant, together with Max Gordon and Samuel Gordon, then all of Lewiston, formed a co-

partnership "for the purpose of Delicatessen & Restaurant in the city . . . of Lewiston under the partnership name of Gordon's Delicatessen." On May 27, 1935 they made and caused to be filed in the city clerk's office in Lewiston certificate of association in accordance with Section 4 of Chapter 44, R. S. 1930.

They carried on the partnership business in Lewiston until April, 1936 when the defendant agreed in writing to retire and sold all his rights and interests in the partnership to his co-partners. Upon his retirement, however, he did not file in the clerk's office a withdrawal certificate.

Following his withdrawal, Max and Samuel Gordon transacted business under the same name in Lewiston.

In April, 1937, Max and Samuel opened a "delicatessen and restaurant" in Portland and so conducted it. No new certificate was filed in the clerk's office in Portland.

Following the defendant's withdrawal, he had nothing whatever to do with the business either in Lewiston or in Portland.

The items sued were contracted at the Portland store. The restaurant equipment was purchased under a conditional sales contract which was signed:

"Gordon's Delicatessen
By Max Gordon
By Sam Gordon
608 Congress St.
Portland, Maine"

It is not contended that the defendant personally had anything to do with this purchase or with the furnishing of the electric service.

On December 7, 1937 Max and Samuel made a common-law assignment of the assets to one Lessard for the benefit of creditors. The plaintiff, notified of the assignment, refused to assent to it, but afterwards did accept and collect a dividend check from the assignee, designated as "First & Final Dividend—9.6%," signed "Gordon's Delicatessen by: ALTON A. LESSARD, Assignee," and bearing on its back the following notation:

"In full satisfaction of all claims against Max Gordon, Sam Gordon & Alton A. Lessard, Common Law Assignee."

The plaintiff (as under the conditional sales contract it had the right to do) repossessed the property, sold it, and credited it on its indebtedness.

The plaintiff bases its right to recover on said Section 4 which reads:

> "Whenever two or more persons become associated as partners or otherwise for the purpose of engaging in any mercantile enterprise, they shall, before commencing business, deposit in the office of the clerk of the city or town in which the same is to be carried on, a certificate signed and sworn to by them, setting forth their names and places of residence, the nature of the busines in which they intend to engage, and giving the name under which they are to transact business. Whenever any member of such partnership or association withdraws therefrom, he may certify under oath to the fact of such withdrawal, which certificate shall be deposited in the clerk's office where the partnership certificate is recorded; and he shall conclusively be presumed to be a member of the firm or association to the time of his depositing such certificate."

Under this statute, because of the failure to file the withdrawal certificate, there could be no question as to the liability of this defendant had the remaining partners, after his withdrawal, contracted new indebtedness *in its Lewiston store* within the actual or apparent scope of the partnership business.

At common law the voluntary assignment of the interest of any member of a partnership at will worked a dissolution.

As stated in *Smith* v. *Virgin*, 33 Me., at page 156:

> "In a partnership at common law with no agreement to continue for any specified time, or to qualify in any manner the principles ordinarily applicable, a dissolution takes place on the assignment of the interest of any member."

Also see 20 R. C. L., Section 178, page 954, to the effect that every change in the personnel of a firm works a dissolution and a new partnership is formed whenever a partner retires or a new one is admitted. Also see Story on Partnership, Sections 269, 272, 302, and 307.

As to the common-law effect of the dissolution of a partnership, Mr. Story says in Section 334:

> ". . . the dissolution of a partnership, whether it be by the voluntary act or will of the parties, or by the retirement of a partner, or by mere efflux of time, will not in any manner change the rights of third persons, as to any past contracts and transactions with, or on account of the firm; but their obligation and efficacy and validity will remain the same, and be binding upon the partnership in the same manner, as if no dissolution had taken place. In the next place, such a dissolution will not absolve the partners from liabilities to third persons for the future transactions of any partners, acting for, or on account of the firm, unless some one or more of the following circumstances occur. (1.) That the third persons dealing with, or on account of the firm, have due notice of the dissolution; or, (2.) That they have had no transactions whatsoever with the firm until after the dissolution; or, (3.) That the partnership was not general, but limited to a particular purchase, adventure, or voyage, and terminated therewith before the transaction took place; or, (4.) That the new transaction is not within the scope and business of the original partnership; or, (5.) That it is illegal, or fraudulent, or otherwise void from its defective nature or character; or, (6.) That the partner, sought to be charged, is a dormant partner, to whom no credit was actually given, and who retired before the transaction took place."

To what extent does this statute enacted in 1915 modify the common law as to the effect of a dissolution by the withdrawal of a partner? It provides a particular manner in which the notice of the withdrawal shall be given and then states that unless the notice is so given the withdrawing partner shall be presumed conclusively to be a member of the firm or association to the time he does file his withdrawal certificate.

Still, that does not mean that the retiring partner is conclusively presumed to be liable for every debt that the remaining members of the partnership may thereafter contract. The effect of the conclusive presumption in the absence of estoppel is limited to such

obligations as could have been lawfully contracted by the partnership had there been no withdrawal of the partner.

A partnership is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business with the understanding that there shall be a community of profits thereof between them. *Bearce* v. *Washburn et al.*, 43 Me., 564, 565; *Banchor* v. *Cilley*, 38 Me., 553, 555. It is founded in the voluntary contract of the parties as distinguished from the relations which may arise between the parties by mere operation of law independent of such contract. See Story, Sections 2 and 3. The contract may be either oral or in writing (here it was oral) and for no definite length of time. Many times has it been said that the law of partnership is a branch of the law of agency. A partner, so far as his own interest is concerned, acts as principal, but as agent as to his partners' interests. The scope of the business is governed by the partnership contract and the partners are not otherwise bound unless the contract be modified or there be estoppel.

> "During the continuance of a general or commercial partnership each member has a right to bind his associates to the performance of every contract he may make in the name of the firm, within the limits allowed by the articles of association; but he cannot bind it by any contracts beyond those limits." 20 R. C. L., Section 104, page 893.

In the instant case there are no facts permitting the application of the doctrine of estoppel.

> "A retiring partner sustains no relation to the remaining members which actually authorizes them to bind him, and whenever a retiring partner is held liable for the debts of the continuing partners, the liability is based on principles of estoppel." 20 R. C. L., Section 216, page 982.

The fact of the failure to file the withdrawal certificate would not constitute an estoppel in favor of this plaintiff. *Hanzes* v. *Flavio*, 234 Mass., 320, 328, 125 N. E., 612; *Crompton* v. *Williams*, 216 Mass., 184, 187, 103 N. E., 298.

". . . the failure to file a certificate on withdrawal as required by law, will not estop a partner from showing his retirement where there is nothing to indicate that the creditor ever heard of his partnership connection or relied on it in any way." 47 C. J., Section 599, page 1035.

Then was this indebtedness incurred within the actual or apparent scope of the original partnership business? This partnership, as it clearly appears from its certificate filed in the clerk's office in Lewiston, was only "for the purpose of Delicatessen & Restaurant *in the city . . . of Lewiston* under the partnership name Gordon's Delicatessen." (*Italic scoring* ours.) By the recording of this certificate, notice of the limitation of the scope of the business was given. The defendant never entered into any partnership contract whereby a delicatessen or restaurant business could be carried on in any place other than in Lewiston. He withdrew from the partnership and actually retired. Under the statute he would still be held to be a member of the firm as to business transacted within its actual or apparent scope carried on in Lewiston, because he didn't file a withdrawal certificate, but not so as to that transacted following his retirement by the remaining partners in the City of Portland. Without his consent, they could not enlarge the scope of the original business and thus against his will make him a party to a different contract.

We cannot conceive that it was the intention of the legislature to create liability upon the part of a retiring partner for indebtedness incurred following retirement outside of the actual or apparent scope of the partnership business. The purpose of the statute is effected when we interpret it to mean only that one who withdraws from a partnership and does not file a certificate of withdrawal (there being no actual estoppel) is conclusively presumed still to be a member of it when carrying on business within either its actual or apparent scope.

Exceptions sustained.

INHABITANTS OF MOSCOW *vs.* INHABITANTS OF SOLON.

Somerset. Opinion, July 22, 1939.

PAUPER AND PAUPER SETTLEMENT.

In an action by one town against another town for pauper supplies, the burden of proof is on the plaintiff town to prove that the pauper is a person of age having his home in defendant town for five successive years without receiving supplies as a pauper, directly or indirectly.

When a person has left a town, and has, to human view, no habitation there, and no visible hold on it, the law does not assume, or presume that he intends a temporary absence, and has a continuing purpose to retain it as his home, and to return to it as his home at some future period. Nor does the law assume that he has no such intention as a legal presumption. It is a question of fact for a jury to determine, upon all the evidence and all the circumstances and all the probabilities, what his intention and purpose were in fact.

The determination of the facts and the inferences and conclusions to be drawn therefrom are for the jury, and upon general motion of the defendant for a new trial, it must plainly appear that there was manifest error in its verdict.

On motion for new trial. Action by Inhabitants of Moscow against Inhabitants of Solon for pauper supplies furnished pauper and his family. Jury verdict for plaintiff. Defendant filed motion for new trial. Motion overruled. Case fully appears in the opinion.

Clayton E. Eames,

James H. Thorne, for plaintiff.

Merrill & Merrill, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. On defendant's motion for new trial. The case is for pauper supplies furnished to Andrew Rollins, his wife and minor children. By stipulation the only issue raised was as to the settlement of the pauper. It was agreed that his original derivative

settlement was in the plaintiff town; that he came to Solon in 1917 and left in 1923, during all of which time he was employed by the railroad company as a section hand; and that he received no pauper supplies during this period. It was also admitted that for each of the years 1918 to 1923, he was assessed a poll tax in Solon and paid the same.

Upon the plaintiff rested the burden of proof to sustain compliance on the part of the present pauper with the provision of R. S., Chap. 33, Sec. 1, Subdivision VI:

> "A person of age, having his home in a town for five successive years without receiving supplies as a pauper, directly or indirectly, has a settlement therein."

As indicated above, the only element of this statute actually in controversy was whether Andrew Rollins had his home in the Town of Solon for five successive years. The issue is narrowed further by substantial unanimity of testimony or agreement of the parties that Rollins in 1917 moved to Solon and made his home with his son for a short time and until the son moved away. Then he boarded in the house of one Charles Clark, and later in the house of Leslie Clark. In September of 1919, the Clarks sold their house and moved out of the state. By the terms of their arrangement, they were allowed thirty days in which to pack and remove their belongings. The purchaser took possession about a week after the former owners had removed. One question submitted to the jury was whether Rollins actually left the premises during this period. It is clearly shown by the great preponderance of evidence that Rollins was physically absent from this dwelling for a short time, the limits of which were not clearly demonstrated, but were within the range of from three to six weeks. The jury could not reasonably have come to any other conclusion on that issue of fact. It also establishes that Rollins during this period went to the adjoining Town of Embden and boarded in the family of one Hilton, where his brother was already a boarder. He continued at his work on the railroad. About a week after the purchasers of the Clark residence took possession, Rollins returned and made arrangements to board with them. He continued with them until his marriage in 1923, and his subsequent removal from the town.

In a word, the real question is, "When Rollins left Solon in 1919, did he intend to return and did he retain that intention during his absence?"

The leading case of *Ripley* v. *Hebron*, 60 Me., 379, is cited as analogous as to facts. There was a temporary absence of the pauper, causing a comparatively short interruption of actual physical residence. Important in distinction, however, was definite evidence of the pauper's intention to effect a change of residence through his acceptance of the invitation of one Kennedy to make his home with him in another town. In the instant case, the testimony of the pauper, while indicating a faulty memory in some respects, is affirmative of intent and purpose to retain his home in Solon, and not to change his place of residence.

The Court in the Ripley case said:

> "When a man has thus left a town, and has, to human view, no habitation there, and no visible hold on it, the law does not assume, or presume that he intends a temporary absence, and has a continuing purpose to retain it as his home, and to return to it as his home at some future period. *Nor does the law assume that he has no such intention as a legal presumption.* (Italic ours.)
>
> "But it leaves to the jury to determine, upon all the evidence and all the circumstances and all the probabilities, what his intention and purpose were in fact. The party setting up the five years' continuous residence, is bound to prove it. This is undoubted. If, whilst attempting to prove it a break in the actual residence is shown, it is for that party to establish such a state of facts as shows that the legal home remained there, notwithstanding the absence."

See also *Solon* v. *Embden*, 71 Me., 418; *Bangor* v. *Frankfort*, 85 Me., 126, 26 A., 1088; *Detroit* v. *Palmyra*, 72 Me., 256; *Searsmont* v. *Thorndike*, 77 Me., 504, 1 A., 448; *Searsmont* v. *Lincolnville*, 83 Me., 75, 21 A., 747; *Ellsworth* v. *Bar Harbor*, 122 Me., 356, 120 A., 50; *Madison* v. *Fairfield*, 132 Me., 182, 168 A., 782.

Gauged by the rule as laid down and elaborated in the foregoing cases, it is clear that the determination of the facts and the in-

ferences and conclusions to be drawn therefrom were for the jury, and upon general motion of the defendant for a new trial, it must plainly appear that there was manifest error in its verdict. Instead, verdict is not inconsistent with the circumstances and probabilities of the case as disclosed by the record, and the inferences and conclusion drawn by the jury as to the intention and purpose of the pauper were justified.

Motion overruled.

EDITH L. HARWOOD *vs.* UNITED STATES FIRE INSURANCE COMPANY.

Kennebec. Opinion, July 29, 1939.

REFERENCE AND REFEREES. INSURANCE.

It is only to rulings of law that exceptions can be taken as to findings of a Referee.

When there is no express waiver, the question as to waiver by conduct is one of fact.

On questions of fact the findings of a Referee are upheld when supported by any credible evidence.

An agent for a fire insurance company must be considered as in place of company in all respects regarding any insurance effected by him and his knowledge is that of insurance company. R. S. 1930, *Chap.* 90, *Sec.* 119.

The law will not require the useless and expensive formality of an arbitration, when the insurer, for whose benefit it was provided, has rendered it superfluous.

Mistaken and honest overvaluation is not, but intentional and fraudulent overvaluation is fatal to recovery in a suit for collection of loss in an action on a fire insurance policy.

Fraud and false swearing imply something more than some mistake of fact, or honest misstatements on the part of assured. They consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for believing to be true.

A statement in proofs of loss of replacement value alone is not sufficient evidence of false swearing.

To avoid the policies it must be shown that the statements in the proofs of loss were knowingly and intentionally untrue.

On exceptions. Action by plaintiff seeking recovery for fire loss. Action based on fire insurance policy. Heard before Referee. Finding for plaintiff in sum of $805.20 with interest. Defendant filed exceptions to acceptance of the report of Referee. Exceptions overruled. Case fully appears in the opinion.

McLean, Fogg & Southard, for plaintiff.

Berman & Berman (Lewiston, Maine), for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, MANSER, JJ.

MANSER, J. This case comes up on exceptions by defendant to the acceptance of the report of a Referee. The finding was for the plaintiff in the sum of $805.20 with interest. The action is based on a fire insurance policy and arose by reason of a loss occasioned by fire which occurred in the forenoon of May 4, 1938. The plaintiff and her family were living in the insured premises. The policy coverage was $400.00 on the house, $100.00 on a shed, and $300.00 on household goods and effects. The fire entirely consumed the buildings and but a few articles of furniture were salvaged. Many defenses were alleged in the pleadings, but the issues before the Referee were narrowed to two contentions by the defendant:

1. Noncompliance with the policy provision as to arbitration of the amount of the loss.
2. Fraudulent overvaluation of the personal property in the plaintiff's proof of loss.

No arbitration as to damages sustained was undertaken, but the Referee ruled that the application of the principles of both waiver and estoppel operated against the defendant and in favor of the plaintiff on this issue.

The Referee further found that the defendant failed to establish fraudulent overvaluation of the personal property in the plaintiff's proof of loss.

It is only to rulings of law that exceptions can be taken as to findings of a Referee. There being no express waiver, the question as to waiver by conduct is one of fact. *Jewett* v. *Ins. Co.*, 125 Me., 234, 132 A., 523; *Robinson* v. *Ins. Co.*, 90 Me., 385, 38 A., 320; *Houlton Trust Co.* v. *Lumbert*, 136 Me., 184, 5 A., 2d 921. On questions of fact the findings of a Referee are upheld when supported by any credible evidence, *Wentworth* v. *Whitney*, 133 Me., 513, 174 A., 461; *Throumoulos* v. *Bank of Biddeford*, 132 Me., 232, 169 A., 307; *Bourisk* v. *Mohican Co.*, 133 Me., 207, 175 A., 345; *Poirier* v. *Shoe Co.*, 136 Me., 100, 3 A., 2d 116. The only issue therefore presented is whether under these rules the record justifies the findings. It does so abundantly. It demonstrates that the buildings were entirely destroyed, and that the loss by reason of such destruction was at least equal to the amount of insurance placed by the defendant thereon. Liability for loss of the buildings can not be denied unless it be by failure of arbitration to prove such admitted loss and the loss upon the personal property, or by forefeiture and avoidance of the entire policy by reason of fraudulent overvaluation of such personal property.

One H. A. Marston was the agent of the defendant company who effected the insurance. It is definitely shown that he came within the statutory provision of R. S., Chap. 60, Sec. 119, and must "be regarded as in the place of the company in all respects regarding any insurance effected by them." So far as the plaintiff was concerned, he was the Company and his knowledge was that of the Company. *Bradbury* v. *Ins. Co.*, 119 Me., 417, 111 A., 609. He told the plaintiff that he knew she had sustained a total loss and testified that at the time of the fire "while I was visiting the remains, I told them an adjuster would *adjust* the loss. When the adjustment was made, it would be necessary for them to wait forty-five days from the time of filing the proof of loss before the money would be paid." He also testified in substance that he knew the loss in each of the insured classifications was greater than the amount of insurance. No suggestion so far of any need of a determination by arbitrators as to the amount of the loss.

The agent, years before, had furnished the plaintiff with a book suitable for the purpose of keeping an inventory or schedule of the insured personal property, the time when bought and its cost

price. At his suggestion, the items of chattels were entered in the book with the additions made from time to time. This book was taken to him and forwarded to the company's adjuster. The plaintiff, having been informed that the "adjuster would adjust the loss" that impression was undoubtedly deepened by a letter from the adjuster notifying the plaintiff of the requirement of a formal proof of loss "in order that I may be able to *appraise* the value of the various articles at the time of the fire." Such proof was made with the assistance of the agent and his clerk, and forwarded to the adjuster, from whom no reply was received. The policy, in compliance with the standard provisions required by statute, provided that upon the *failure of the parties to agree* as to the amount of loss, such amount should be determined by arbitrators.

Never, thereafter, before this action was commenced, was the plaintiff informed by the adjuster, the agent or from the company's office, that there was disagreement as to the amount of the loss. Instead, the agent wrote to the plaintiff's attorney, "It was my understanding that this claim was to be paid 45 days from the date of filing of the proof, which would have made the payment due October 14th." Then on October 24, 1938 the agent wrote the plaintiff, "It would appear in order for you to collect this claim you will have to take action against the Company."

With no intimation that the proof of loss was challenged as to values, with no information given to the plaintiff that there was disagreement as to the amount of the loss, with the acknowledgment of the agent that the loss exceeded the insurance coverage, the Referee was amply justified in his conclusion the requirement of the policy for arbitration as to amount could not be interposed, and that "the law will not require the useless and expensive formality of an arbitration, when the insurer, for whose benefit it was provided, has rendered it superfluous." *Oakes* v. *Ins. Co.*, 112 Me., 52, 90 A., 707, 708.

In such a situation the announcement to the plaintiff by the agent that "in order for you to collect this claim you will have to take action against the Company" must be fairly construed as the Company's denial of liability, notwithstanding an admitted loss in excess of insurance coverage. This constitutes a clear waiver of the arbitration provision and it is unnecessary to determine whether

the acts and statements of the agent and adjuster created an estoppel within the technical meaning of the term, that the plaintiff was not thereby misled to her loss or injury (a proposition stressed by the defendant), citing *Bryson* v. *Ins. Co.*, 132 Me., 172, 168 A., 719.

The issue of fraudulent overvaluation of personal property was open to the defendant. The governing rules are well established, as appears from the following citations:

> "Mistaken and honest overvaluation is not, but intentional and fraudulent overvaluation is fatal to recovery." *Archibald* v. *Fire Ins. Co.*, 117 Me., 205, 103 A., 162.

> "Fraud and false swearing imply something more than some mistake of fact, or honest misstatements on the part of the assured. They consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for believing to be true." *Atherton* v. *Ins. Co.*, 91 Me., 289, 39 A., 1006.

> "Replacement value alone is not sufficient evidence of false swearing." *Austin* v. *Ins. Co.*, 126 Me., 478, 139 A., 681, 683.

> "To avoid the policies it must be shown that the statements in the proofs of loss were knowingly and intentionally untrue." *Cole* v. *Ins. Co.*, 113 Me., 512, 95 A., 217.

Basing decision on these authorities, the defendant fails to sustain contention. The evidence negatives fraud instead of proving it. Plainly, the plaintiff erroneously assumed, as do many who undertake to protect themselves from loss by fire, that the cost or replacement value was the criterion of such loss. No false statements as to cost are asserted. Nothing was concealed. Full information was given. There is no claim that property not destroyed was included. The total of the values given was approximately three times the amount of the insurance. It was evidently an honest mistake on the part of the plaintiff as to the correct basis for computing insurance values, and the Referee was right in his finding that no forfeiture was created.

The entry will be *Exceptions overruled.*

MILO WATER COMPANY *vs.* INHABITANTS OF TOWN OF MILO.

Kennebec. Opinion, August 1, 1939.

PUBLIC UTILITIES COMMISSION.

It is a cardinal rule of interpretation applying to writings generally that every phrase must be read in connection with the whole instrument, and particularly in the case of a decree of a court, and an order of the Public Utilities Commission is in that category, that the pleadings, the issues presented, in short the whole proceedings must be considered to determine what the decree was intended to accomplish.

Courts are concerned today with substance rather than with form, with the spirit rather than with the letter.

If town feels aggrieved by an order of the Public Utilities Commission fixing rates, it has the right to apply to the commission for a modification of it. So long as it stands, the town is bound by its terms.

On report. Action of assumpsit by Milo Water Company to recover balance of $6750.00 claimed to be due from the Town of Milo for fire protection service and $1080.00 for interest. Judgment for the plaintiff for $6769.70 with interest from the date of the writ. Case fully appears in the opinion.

McLean, Fogg & Southard, for plaintiff.

Fellows & Fellows,

Jerome B. Clark, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. This action of assumpsit is before this Court on report. It is brought to recover a balance of $6750.00 claimed to be due from the Town of Milo to the Milo Water Company for fire protection service and $1080.00 for interest. The only point at issue is the interpretation of an order of the Public Utilities Com-

mission. For a proper understanding of the matter a survey of the long controversy between the town and the water company is pertinent.

In 1909 the parties entered into a contract under the terms of which the plaintiff agreed to supply water to the defendant. The contract was to run for twenty years. The town agreed to pay $1500.00 each year for the use of forty hydrants and for certain other services a sum equal to the amount of the tax, if any, assessed against the company. In 1920, on petition of the company, the Public Utilities Commission entered an order authorizing an increase in the annual hydrant rental to $40.00 per hydrant. By votes of the town the number of hydrants was increased from forty until in 1929 there were forty-eight. September 30, 1927 the commission ordered a further increase in hydrant rental from $40.00 to $60.00 per hydrant. In promulgating this decree the commission made the following statement: "We shall assume that the water company and the Town of Milo will continue to be guided by the terms of the present contract, except as modified by this and former decrees of this Commission." The commission here was referring to the fact that in accordance with the terms of the original contract the town remitted to the company the taxes which it could have assessed against it. April 1, 1928 the town countered by assessing a tax against the company, the portion of which applicable to the water system amounting to $3837.93. On August 1 following, the company petitioned the commission for an increase in rates to meet this additional operating cost; and on October 26, 1928 the commission entered a decree authorizing an increase in hydrant rental to $140.00 per hydrant to compensate for such taxes. In explanation of its order the commission said: "Although the amount to be paid for municipal fire protection, both in the existing schedule of rates and in the schedule as modified by this order, is ascertained on a per hydrant basis, that fact is merely a convenient method of determining what the proper gross amount to be paid for the fire protection service shall be. The company is affording certain protection within the territory covered by the municipal hydrants. If more hydrants were installed within that territory, the costs to the company for fire protection services would not be increased proportionately to the number of new hy-

drants installed. We shall, for this reason, increase the per hydrant rate of the existing hydrants only, this being the number on which the present revenue requirements are based. If additional hydrants be installed, the per hydrant rate therefore will be fixed at Sixty Dollars ($60.00) which, in our opinion, will be sufficient to reimburse the company for the extra expense that would be incurred in furnishing such additional hydrant service." It is apparent that the commission was seeking to establish a certain minimum amount which the town should pay for fire protection on the assumption that there would be at least forty-eight hydrants for which the town would pay. The following year on June 19, 1929, the plaintiff again petitioned for an increase in rates. The commission in justification of an order filed January 27, 1930 directing an increase in the rates of both private consumers and of the municipality considered with great care the amount of revenue which it felt that the company should receive. It figured that there should be an increase to be paid by the town of $480.00 and by private consumers of $564.00. With reference to the increase to be paid by the town the commission said: "We have increased the hydrant rental for first 48 hydrants from $140 to $150 per year, resulting in increased revenue of $480.00." Then follows the order which so far as it relates to municipal services reads as follows:

"For the first 48 hydrants, each hydrant $150.00
Each additional hydrant ..... $ 60.00."

At the annual town meeting held March 14, 1932 the town voted to discontinue as of April 1, 1932 the use of four hydrants and the clerk of the company billed the town for forty-four hydrants at $150.00 each. Immediately, however, on the matter being called to the attention of the president of the company, a corrected bill was sent for forty-eight hydrants at $150.00 each, and the company has always claimed that it was entitled to be paid on this basis. At the annual town meeting held March 13, 1933 the town voted to discontinue the use of three more hydrants.

The plaintiff claims that it is entitled to receive from the town for hydrant rental a minimum amount of $7200.00 per year from April 1, 1932 to December 31, 1938. The town claims that it is only required to pay for forty-four hydrants from April 1, 1932 to

April 1, 1933 and for forty-one hydrants thereafter, and these amounts it has paid. This suit is brought to recover the balance amounting to $6750.00 and interest of $1080.00.

The defendant does not deny that at all times since April 1, 1932 the plaintiff has maintained forty-eight hydrants ready for use but it does claim that the order of the Public Utilities Commission does not require the town to pay a lump sum for fire protection and that it accordingly had the right to discontinue the use of any hydrants and is required to pay only for the balance at the scheduled rate of $150.00 per year per hydrant.

Counsel for the defendant insist that this Court can consider only that part of the commission's finding and order which reads: "For the first 48 hydrants, each hydrant $150." They say that the meaning of these words taken by themselves is clear and that therefore we can investigate no farther. But it is a cardinal rule of interpretation applying to writings generally that every phrase must be read in connection with the whole instrument, and particularly in the case of a decree of a court, and an order of the Public Utilities Commission is in that category, that the pleadings, the issues presented, in short the whole proceedings must be considered to determine what the decree was intended to accomplish. *Mayor and Aldermen of the City of Vicksburg* v. *Henson*, 231 U. S., 259, 34 S. Ct., 95. Courts are concerned today with substance rather than with form, with the spirit rather than with the letter.

It is obvious that the Public Utilities Commission did not view the petition filed June 19, 1929 on which the order in question is based as an isolated proceeding. It is in effect a petition for a modification of its earlier order, which in turn modified an order entered several years before. To determine what the commission intended, the entire proceedings should be considered. From these it is apparent that the commission was endeavoring to provide adequate revenue for the water company and for a proper apportionment of charges between the municipality and private consumers. When the town, as it had a right to do, collected from the company taxes which became a part of its operating expenses, rates for fire protection were raised. In its last order the commission calls attention to the fact that the increase in rental of $10.00 per hydrant would result in increased revenues of $480.00. In its review of

the case accompanying its order of October 26, 1929, it specifically calls attention to the fact that the amount to be paid for fire protection is a gross amount though figured on a per hydrant basis. Looking at the whole record, it is clear that the commission was concerned with the gross amount to be paid by the town for fire protection rather than with the amount to be paid per hydrant and that the rate was established on the assumption that there would be a minimum of forty-eight hydrants. Though the form of the order did not call for the payment of a gross sum as in the case of *Damariscotta-Newcastle Water Company* v. *Itself, Re: Increase in Rates*, 134 Me., 349, 186 A., 799, yet, that a fixed minimum amount should be paid was clearly the intent of the commission. There seems to be no reason whatsoever why this Court should tear an isolated phrase from its context and give to it a meaning clearly at variance with that which the commission intended.

Counsel for the defendant call attention to the fact that bills were rendered by the plaintiff on a hydrant rental basis. This was of course of no consequence to the plaintiff so long as the town paid for the full number of forty-eight hydrants. The significant fact is that there was an immediate protest when the town claimed the right to discontinue certain hydrants and pay only for the balance.

If the town feels itself aggrieved by the order in question, it has the right to apply to the commission for a modification of it. So long as it stands, the town is bound by its terms.

The defendant claims that it is not liable for interest because the claim sued on is unliquidated and in any event is uncertain because of the unsettled state of the law. We can not see that the law is at all doubtful, nor is a claim unliquidated merely because one party disputes it. A demand was made by the plaintiff each year for the amounts here claimed. The defendant was in default for nonpayment. There seems to be no reason why the plaintiff is not entitled to interest.

The record before this Court indicates that the sums claimed became due December 31 of each year. The writ is dated December 12, 1938. The sum claimed for the year 1938 was not then due and payable. The plaintiff is entitled to recover only for the amounts claimed to December 31, 1937, totalling $5700.00, with interest to

the date of the writ amounting to $1069.70. Without prejudice to the right of the plaintiff to bring suit to recover for payments due since December 31, 1937, the entry will be,

Judgment for the plaintiff for $6769.70 *with interest from the date of the writ.*

JUNE E. ESTABROOK *vs.* WEBBER MOTOR CO.

CURTIS G. ESTABROOK *vs.* WEBBER MOTOR CO.

Penobscot. Opinion, August 1, 1939.

NEGLIGENCE. PLEADING AND PRACTICE.

In actions for injuries sustained as the result of alleged latent defects in steering gear of automobile, declaration failing to allege specifically any defects in steering gear for which vendor was responsible was subject to special demurrer, since defendant was entitled to a definite statement of wherein it was at fault, before being required to answer.

On exceptions. Action by plaintiff, June E. Estabrook, to recover for personal injuries alleged to have been caused by defendant's negligence, and action by Curtis G. Estabrook, husband, to recover for personal injuries and for expenses for wife and for loss of her consortium. A special demurrer was filed to each declaration. Demurrers sustained. Plaintiffs filed exceptions. Exceptions overruled. Cases fully appear in the opinion.

Stern & Stern, for plaintiff.

James M. Gillin,

Myer W. Epstein, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. There are before us here two cases. The first is brought by June E. Estabrook to recover for personal injuries alleged to have been caused by the defendant's negligence, the second by Curtis G. Estabrook, her husband, to recover for his own personal injuries and for expenses in caring for his wife and for the loss of her consortium. The declarations in the two cases in so far as they relate to the defendant's negligence are the same. A special demurrer was filed to each declaration which was sustained, and in each case the plaintiff filed exceptions.

The pertinent allegations on the issue of negligence are that the defendant on the eighteenth of May, 1932, was the authorized distributor of Ford automobiles at Bangor and as such distributed, sold and serviced Ford cars; that the defendant owed to the public and to the plaintiffs the duty to use due and reasonable care in such selling, distribution and servicing, and particularly so as to insure the reasonable suitability of the automobiles for the use intended so that defective automobiles should not be sold or distributed to the public as fit to buy, drive and ride in; that on the day aforesaid the defendant sold and delivered to the plaintiff, Curtis G. Estabrook, a new Ford automobile; that the said defendant negligently sold and serviced said automobile and caused and permitted it to have certain latent defects in the steering gear and in other respects so that, while said automobile on the thirteenth day of October, 1932, was being lawfully, carefully and properly driven by the plaintiff, June E. Estabrook, with her husband therein, and while both were in the exercise of due care, by reason of said latent defects it suddenly became unmanageable and left the road, turned over, and caused injuries to the plaintiffs. A second count in each case contains nothing but a general allegation of negligence.

The defendant in its special demurrers sets forth more than twenty objections. Only one need be considered — that the plaintiff does not allege specifically any defects in the steering gear for which the defendant was responsible.

The ruling of the presiding Justice in sustaining the demurrers is in accord with the cases of *Aldrich* v. *Boothby*, 114 Me., 318, 96 A., 227, and *McGraw* v. *Great Northern Paper Co.*, 97 Me., 343, 54 A., 762. These cases hold that it is not sufficient to allege merely that a machine which causes injury is defective; and in accordance

with those decisions, in the present case the particular fault should have been set out in order that it may be determined whether it is one for which the vendor of the article is liable. This automobile was bought in May; the accident took place in October. Many things might have occurred in that interval to render the machine unsafe for which the vendor would be in no way responsible. Before being required to answer, the defendant was entitled to a definite statement of wherein it was at fault. To be so informed is not a technical requirement but a fundamental right.

Such a declaration as is here before us has in this jurisdiction invariably been held bad when attention has been called to its insufficiency by a special demurrer. Cases cited by the plaintiff which involve an application of the doctrine of *res ipsa loquitur*, *Shea* v. *Hern*, 132 Me., 361, 171 A., 248, or the relationship between a common carrier and a passenger, *Hebert* v. *Portland Railroad Company*, 103 Me., 315, 69 A., 266, are well-recognized exceptions to the general rule.

Exceptions overruled.

FITZROY F. PILLSBURY *vs.* KESSLEN SHOE COMPANY.

York. Opinion, August 1, 1939.

ACTIONS. RES ADJUDICATA.

The primary right belonging to a plaintiff and the corresponding duty belonging to a defendant, and the delict or wrong done by the defendant, consisting in a breach of such primary right or duty, constitute a cause of action.

It is common learning that a plaintiff can not split up a cause of action and bring several actions for the different items of damage resulting from the one cause of action. If he does bring an action for some only of such items of damage, he is barred from bringing another action for any other items of damage from the same cause.

The general rule is that ordinarily a judgment between the same parties or their privies is a bar to another suit for the same cause of action, and is conclusive not only as to all matters which were tried in the first action but as to all matters which might have been tried.

The decided weight of authority is that in this case there is but one cause of action with different elements of damage arising from it and that the recovery of a judgment for personal injuries is a bar to an action for property damage occasioned by the same accident.

On exceptions. Plaintiff, in September, 1935, brought action against the defendant to recover for personal injuries received in a collision between defendant's truck and plaintiff's automobile. Verdict for plaintiff for $6,750. Judgment entered for plaintiff for this amount with costs and interest. February, 1937, this action was commenced to recover property damage to plaintiff's automobile resulting from same collision. Defendant pleaded former judgment in bar of action. Plea sustained. Action dismissed. Plaintiff filed exception. Exception overruled. Case fully appears in the opinion.

Louis B. Lausier,

William P. Donahue, for plaintiff.

Waterhouse, Titcomb & Siddall, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. September 9, 1935, this plaintiff commenced an action against this defendant to recover for personal injuries received in a collision between the defendant's truck and the plaintiff's automobile. A verdict was rendered for the plaintiff for $6,750 and judgment was entered for such amount together with costs and interest. February 18, 1937, this action was commenced to recover for damages to the plaintiff's automobile resulting from the same collision. The defendant pleaded the former judgment in bar of the action. The plea was sustained and the action dismissed. The plaintiff excepted.

The plaintiff claims that two separate causes of action arise from a negligent act which inflicts injury on both a person and on his property and that a judgment recovered in an action for personal injuries is not a bar to an action to recover for damages to the property.

With this contention we can not agree. In *Anderson* v. *Wetter,* 103 Me., 257, 265, 69 A., 105, the Court cites with approval the

following definition of a cause of action from Pomeroy, Remedies, Sec. 452: "The primary right belonging to the plaintiff and the corresponding duty belonging to the defendant, and the delict or wrong done by the defendant, consisting in a breach of such primary right or duty, constitute a cause of action."

In *Braithwaite* v. *Hall*, 168 Mass., 38, 46 N. E., 398, the plaintiff brought suit to recover for personal injuries and for the destruction of his bicycle caused by a collision with the defendant's carriage. There was a demurrer to the declaration on the ground that it joined two causes of action. In overruling the demurrer Holmes, J., said, 168 Mass., at page 39, 46 N. E., at page 399: "The single collision which caused the damage to the plaintiff's person and to his bicycle was one cause of action."

It may be true that the exact point here raised has not been before this Court but from analogous cases we are assured what the Court would have done had the exact issue been presented.

In *Foss* v. *Whitehouse*, 94 Me., 491, 48 A., 109, it appears that the plaintiff had refused to pay a tax which he claimed to have paid. On being committed to jail he paid it and then brought against the collector two actions, one for money had and received and the other for unlawful imprisonment. In holding that a judgment in one would bar an action in the other, the Court, 94 Me., at page 497, 48 A., at page 112, used language which is very pertinent on the issue now before us:

> "It is common learning that a plaintiff cannot thus split up a cause of action and bring several actions for the different items of damage resulting from the one cause of action. If he does bring an action for some only of such items of damage, he is barred from bringing another action for any other items of damage from the same cause."

In *Corey et al.* v. *Independent Ice Co. et al.*, 106 Me., 485, 76 A., 930, the general rule is laid down that ordinarily a judgment between the same parties or their privies is a bar to another suit for the same cause of action, and is conclusive not only as to all matters which were tried in the first action but as to all matters which might have been tried.

See to the same effect *Emerson* v. *Lewiston, Augusta & Waterville Street Railway*, 116 Me., 61, 100 A., 3.

These cases are indications of the natural aversion of the court to protracted litigation and multiplicity of action. It is against public policy that controversies should not have an end; the public should not be called on to bear the expense of two trials where one will suffice. Nor should parties be called on to pay the bills for two suits where one only is necessary.

The decided weight of authority is that in such a case as the one now before us there is but one cause of action with different elements of damage arising from it and that the recovery of a judgment for personal injuries is a bar to an action for property damage occasioned by the same accident. *Doran* v. *Cohen*, 147 Mass., 342, 17 N. E., 647; *Braithwaite* v. *Hall*, supra; *King* v. *Chicago, Milwaukee & St. Paul Railway Company*, 80 Minn., 83, 82 N. W., 1113; *Georgia Railway & Power Company* v. *Endsley*, 167 Ga., 439, 145 S. E., 851; *Cassidy* v. *Berkovitz*, 169 Ky., 785, 185 S. W., 129; *Coy* v. *St. Louis and San Francisco Railroad Company*, 186 Mo. App., 408, 172 S. W., 446; *Kimball* v. *Louisville & Nashville Railroad Company*, 94 Miss., 396, 48 So., 230; *Fields* v. *Philadelphia Rapid Transit Co.*, 273 Pa., 282, 117 A., 59; *Sprague* v. *Adams*, 139 Wash., 510, 247 P., 960; *Mobile & Ohio Railroad Company* v. *Matthews*, 115 Tenn., 172, 91 S. W., 194, 3 Ann. Cas., Note 465.

Exception overruled.

ANNA MARGARET JONES, APPELLEE

vs.

NORMAN BAILEY JONES, APPELLANT.

Kennebec. Opinion, August 14, 1939.

DIVORCE. JUDGMENT.

In proceeding to have validity of petitioner's second marriage determined, burden is on petitioner to prove legal separation from her first husband.

The right of the court to divorce is wholly statutory.

The severance of the marriage tie by divorce is accomplished by a decree of court and by that alone.

A decree of divorce is in the nature of a judgment.

To constitute a judgment or decree, there must be a then existing intent to take final judicial action on the issue presented, but before such a pronouncement should be taken as the judgment, it must be clear that it was intended as such and not merely an announcement of the opinion of the court or an indication of what the judgment is to be. It should be certain that the court intends to pronounce a judgment and not merely to make a preliminary order which is expected to result in a judgment at a later date.

On exceptions. Proceeding under R. S. 1930, Chapter 73, Section 15, the petitioner, Anna Margaret Jones, seeks to have the Court determine the validity of the marriage she contracted with respondent, praying that it may be either annulled or affirmed according to proof. Justice below affirmed it. Respondent filed exceptions. Exceptions sustained. Case fully appears in the opinion.

McLean, Fogg & Southard, for appellee.

Harold W. Hurley,

Frank A. Tirrell, Jr., for appellant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. Proceeding under R. S. 1930, Chapter 73, Section 15, the petitioner, Anna Margaret Jones, seeks to have the Court determine the validity of the marriage she contracted with the respondent, Norman Bailey Jones, in Portsmouth, New Hampshire, on April 7, 1938. She prays that it may be either annulled or affirmed according to proof.

The justice below affirmed it. He ruled that the petitioner was legally divorced from her prior husband, Percy N. Hill, on April 6, 1938, and contracted a valid marriage on the following day. To these rulings the respondent excepted.

The petitioner sued Mr. Hill in divorce on February 11, 1938 by libel returnable to the March Term, 1938, of the Superior Court in Cumberland County. It was heard on April 6, 1938, the second day of the next term. On the following day, April 7, she was married

to the respondent. The divorce decree was not signed and filed in court until April 18, 1938, the twelfth and last day of the term.

In Cumberland County a jacket for the enclosure of papers, made under the supervision of the clerk for convenience of his office and the court, is ordinarily if not always made use of in divorce cases. On the front cover is a form in blank that may be used by the justice if he so desires. No law compels it.

The justice who heard this divorce case filled in the blank spaces so that it read:

> "1938 April T 2 d Having had Divorce decreed for cause of cruel and abusive
> Custody of minor child to Libellant with right to Libellee to see him at all reasonable times."

He then signed his name and underneath his signature initialed "J. S. C.," for the words "Justice Superior Court." Beneath his signature it read:

> "A true copy of the memorandum made on the original jacket for the use of the office of the Clerk of Courts.
> Attest:
> Linwood F. Crockett (Signed)
> (Seal) Clerk."

Docket entries made by the clerk are:

> "Mch. T. 1938
> Apr. T. 1938 2d. Defaulted. Hearing Had.
> 12 d. (April 18, 1938) Decree filed.
> Divorce decreed for cause of cruel and abusive treatment. Care and custody of minor child, Allan D. Hill, given to Liblt. with right to Libellee to see him at all reasonable times."

The question presented is when was the divorce granted, on April 6 or on April 18. If on the former date, the marriage to the respondent was legal; if on the latter, illegal.

The contention of the appellee is that the signing of the jacket memorandum constituted a judgment or decree and then effected a legal separation.

The issue really is determined by the fact that the record fails to disclose any evidence whatsoever showing when the memorandum was made or signed, whether before or after the marriage. The burden to prove legal separation from her first husband was on the petitioner and this she failed to do.

But even if it could be inferred from facts proven that the memorandum was made and signed before the marriage, on April 7, we think that in any event the divorce did not take place until April 18.

The right of the court to divorce is wholly statutory. *Stratton* v. *Stratton, Admr.*, 77 Me., 373, 377; *Stewart* v. *Stewart*, 78 Me., 548, 551, 7 A., 473.

Section 2 of Chapter 73, R. S. 1930 provides: "A divorce from the bonds of matrimony *may be decreed*. . . ." (Italics ours.)

> ". . . the severance of the marriage tie by divorce is accomplished by a decree of court and by that alone." *Bernatavicius* v. *Bernatavicius*, 259 Mass., 486, 488; 17 Am. Jur., Section 424, page 356.

And yet, as stated in *Simpson, Lib't* v. *Simpson*, 119 Me., 14, on page 16, 109 A., 254, a decree of divorce is in the nature of a judgment. Although a judgment is sometimes said to be distinguishable from a decree (2 Daniell Ch. Pr., 986; 1 Black on Judgments, Section 1; 23 Cyc., Section 2, page 666; Bouvier's Law Dictionary, Baldwin's Century Edition 1934, page 279), it is not necessary here to determine whether this signed memorandum constituted strictly a judgment or decree, for we think it constituted neither.

To constitute either, there must be a then existing intent to take final judicial action on the issue presented. Mr. Freeman in his work on Judgments says in Volume 1, pages 81 and 82:

> "But before such a pronouncement should be taken as the judgment it must be clear that it was intended as such and not merely an announcement of the opinion of the court or an indication of what the judgment is to be. In other words, it should be certain that the court intends to pronounce a judgment and not merely to make a preliminary order which is expected to result in a judgment at a later date."

That herein which the appellee claims constituted a judgment or decree was simply a memorandum only for the benefit and future use of the justice, when, at the end of the term, as is ordinary practice in this state, divorce decrees are signed and filed. His purpose whenever he signed it was not *then* to pronounce judgment. The affixture of his signature only verified it as the court's memorandum. It was sketchy and incomplete. It did not even state correctly the ground of divorce. The very fact that on the last day of the term the justice signed and filed a complete, accurately worded, and formal decree tends strongly to show that the court only then spoke in judgment and had not theretofore so spoken. If the memorandum had been intended by the court as a then pronouncement of his judgment, there was no necessity for the later decree.

In her petition Mrs. Jones states that after her marriage to Mr. Jones on April 7, aforesaid, they lived together as husband and wife and "that she is now with child by the said Jones" and prays to have the status of her unborn child determined. The record, however, contains no evidence to show that she ever bore a child by the respondent. In the decision by the justice below, no mention is made of such a child. Furthermore, this point is not argued in briefs of counsel and is not set forth in the bill of exceptions. Consequently, we do not consider and determine the question as to the status of such a child if one were in fact born.

Counsel argued the applicability to divorce actions of Rule of Court XXX, entitled Day of Rendition of Judgment, and which provides:

> "All judgments on whatever day given shall date and be entered as of the last day of the term unless upon written motion stating the reason therefor an earlier day be specially ordered."

This we need not and do not decide.

The appellee claimed that the bill of exceptions was not filed within the statutory period (R. S. 1930, Chapter 96, Section 39), but it was. Judgment below was rendered on February 4, 1939 and these exceptions were filed on the last of the thirty days, to wit, March 6th.

It is also claimed by the appellee that the exceptions were inade-

quate. The law as to adequacy of exceptions has been so recently and so many times stated that we feel it necessary now only to say that these exceptions were adequate.

Exceptions sustained.

STATE OF MAINE *vs.* HOWARD MERRY.

Hancock. Opinion, August 29, 1939.

HOMICIDE. CRIMINAL LAW. EVIDENCE. EXCEPTIONS. WORDS AND PHRASES.

In Maine, degrees of murder have been abolished. The crime is now defined by statute as the unlawful killing of a human being, with malice aforethought, either expressed or implied.

Where only one exception was pressed and others seemed to have been waived, discussion, initially, in a reply brief, of the one exception, is out of order.

When, at the trial of a criminal case, a witness for the prosecution testifies as to statements of the accused, tending to show that he is guilty, the rule as to the non-permissibility of self-serving statements does not preclude eliciting, on cross-examination of the witness, the whole of the subject matter, even though statements so drawn out are favorable to him.

In murder prosecution, respondent's exception to ruling sustaining objection to question propounded, on cross-examination, of witness could not be sustained where there was no exception directing attention to any ruling which precluded respondent from eliciting any statement which he might have made to witness, and what the witness would have replied had he been allowed to answer was not shown.

Appeal from a conviction of homicide brings up for review only the record in the case, the record, in this sense being inclusive of a stenographic transcript of the testimony upon which the conviction is based.

A conviction may rest on circumstantial evidence.

To justify a conviction on circumstantial evidence, the circumstances relied on must not only be consistent with, and point to the prisoner's guilt, but must be inconsistent with any other rational hypothesis.

In a criminal case it is the province of the jury to settle the facts and de-

termine the reasonable inferences to be drawn therefrom. The jurors are the ultimate, rightful and paramount judges of the facts.

In murder, malice aforethought must exist, and, as any other elemental fact, be established, not beyond all possible doubt, but beyond a reasonable doubt; malice is not limited to hatred, ill will or malevolence toward the individual slain; it includes that general malignancy and disregard of human life which proceed from a heart void of social duty, and fatally bent on mischief.

Malice aforethought may be expressed or implied. It is express when the wrongful act is done with a sedate and deliberate mind and formed design. It is implied when there is no showing of actual intent to kill, but death is caused by acts which the law regards as manifesting such an abandoned state of mind as to be equivalent to a purpose to murder. Malice includes intent and will.

A wrongful act, known to be such, and intentionally done, without just cause or excuse, constitutes malice in law.

Malice aforethought implies premeditation.

Under the statute, there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. The time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. When the time is sufficient for this, it matters not how brief it is.

On a prosecution for murder, motive — that is, the cause or reason that induced commission of the crime — is not an essential element.

Evidence of motive is admissible for the purpose of furnishing evidence tending to prove guilt, which, in connection with the whole evidence, the jury must consider.

Intent, and not motive, governs. A conviction for murder may be had, where, without reference to the motive which prompted it, there was an intention to do a criminal act.

It is common knowledge, that, in some towns, daylight saving, one hour faster than official time, is, during the summer season, the system of measurement of time.

Evidence of identity, although given positively and directly, is, after all, but the mere opinion of the witness, who should be required to give the facts upon which he based his statement, as the jury have a right to it to aid them in their determination of the matter in issue.

One of the modes of identifying personal property, whether in or out of court, is by appearance of the property itself, but, in this matter, as in many others,

the weight of the testimony must generally depend upon the knowledge or familiarity of the witnesses with the subject upon which they speak.

In a criminal case the most accurate expression of identity of articles of a specific kind is to be found by the witness in the general appearance of the property and the witness' opportunities for observing and his attentiveness in observing. In these are found the sources of accurate impression.

In a criminal prosecution, the law casts upon the state the burden to prove the guilt of the accused, not by a mere preponderance of the evidence, but beyond a reasonable doubt.

As the term reasonable doubt is used in instructing juries in criminal cases, a reasonable doubt is not a vague, fanciful or speculative doubt, but a doubt arising out of the case as presented, for which some good reason may be given, and such a doubt as, in the graver transactions of life, would cause reasonable, fair-minded, honest and impartial men to hesitate and pause.

If, at the trial of a case, there is a conflict in the evidence, the jury must, so far as possible, reconcile the testimony before it; if the evidence given by different witnesses presenting different states of fact, cannot be reconciled by the jury, then the triers must determine what part of the evidence is credible and worthy of belief, and determine the relative weight of testimony.

On appeal and exceptions. Respondent tried and convicted of the crime of murder before a jury at the September Term, 1938, of the Superior Court for the County of Hancock. After conviction, respondent filed before presiding justice a motion for a new trial on the grounds that the verdict was against the evidence, and the weight of the evidence, and against the law. Motion was denied. Case brought up on appeal from denial of new trial motion and on a bill of exceptions. Exceptions overruled. Appeal dismissed. Motion for new trial denied. Judgment for the State. Case remanded for sentence. Case fully appears in the opinion.

Franz U. Burkett, Attorney General,
William B. Blaisdell, Assistant Attorney General,
Norman Shaw, County Attorney, for State.
William S. Silsby,
Hodgdon C. Buzzell, for respondent.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. No one doubts that Frank Crowhurst was murdered. His dead body was found on Monday morning, July 25, 1938, on the floor of a small building in Gouldsboro, which he had used as a wayside place and filling station, as well as for his living quarters. The county medical examiner testified that his examination of the body disclosed wounds on the man's head, one penetrating the skull, and multiple lacerations; all the wounds could have been inflicted by an instrument with a rounded head, such as a hammer or a socket wrench. He stated it as his opinion that there were eight blows, possibly more, one or all causing violent death.

Howard Merry (respondent below, appellant here, the designations interchangeable,) was suspected of the deed. He was indicted for murder.

In this State, degrees of murder have been abolished. The crime is now defined by statute as the unlawful killing of a human being, with malice aforethought, either expressed or implied. R. S., Chap. 129, Sec. 1.

Put upon his trial, before a jury, at the September Term, 1938, of the Superior Court for the County of Hancock, the respondent was found guilty of murder. He filed, to the trial court justice presiding at the term, a motion for a new trial, on the grounds that the verdict was against the evidence, and the weight of the evidence, and hence against the law. The motion was rejected.

The case is brought up, both on appeal from the rejection of the new trial motion, and on a bill of exceptions.

Save one, the exceptions are not pressed, and seem to be waived. Counsel recognize that discussion, initially, in their reply brief, of the one exception, is out of order. Nevertheless, argument in support thereof is that when, at the trial of a criminal case, a witness for the prosecution testifies as to statements of the accused, tending to show that he is guilty, the rule as to the non-permissibility of self-serving statements does not preclude eliciting, on cross-examination of the witness, the whole of the subject matter, even though statements so drawn out are favorable to him. *Com.* v. *Britland* (Mass.) 15 N. E. (2nd), 657.

No exception taken below directs attention to any ruling which precluded the respondent from eliciting any statement which he might have made to the testifying witness. The exception reserved

goes to a ruling sustaining objection to this question, propounded on cross-examination, to Sheriff Hodgkins:

"Did you ask him (respondent) to do anything at that time, or suggest his doing anything?"

What the witness, had he been allowed to answer, would have replied, is not shown.

Viewed from any angle, the exception is without legal merit.

This appeal from a conviction of homicide brings up for review only the record in this case, the record, in this sense, being inclusive of the stenographic transcript of the testimony upon which the conviction is based.

The proposition of the defense on the appeal is that on the evidence in entirety, the fact as to who committed the crime is in reasonable doubt.

The State contends the proof to establish that the respondent perpetrated the murder, actuated by malice as well as motive.

The evidence is, in part, circumstantial.

A conviction may rest on circumstantial evidence. This is too well established to require discussion. *State* v. *Lambert*, 97 Me., 51, 53 A., 879; *State* v. *Terrio*, 98 Me., 17, 56 A., 217; *State* v. *O'Donnell*, 131 Me., 294, 161 A., 802; *State* v. *Cloutier*, 134 Me., 269, 186 A., 604; *State* v. *Brewer*, 135 Me., 208, 193 A., 834.

To justify a conviction on circumstantial evidence, the circumstances relied on must not only be consistent with, and point to the prisoner's guilt, but must be inconsistent with any other rational hypothesis. 20 Am. Jur., Sec. 1217; *Com.* v. *Webster*, 5 Cush., 295; *State* v. *Lambert*, supra; *State* v. *Terrio*, supra; *State* v. *O'Donnell*, supra; *State* v. *Cloutier*, supra; *State* v. *Brewer*, supra.

To be useful in evidence, a fact must be proved to be true. In the courtroom, facts are proved by the testimony of witnesses.

It is elementary, in a criminal case, that it is the province of the jury to settle the facts, and determine the reasonable inferences to be drawn therefrom. *Warner* v. *State*, (Ind.) 175 N. E., 661, 74 A. L.R., 1357. The jurors are the ultimate, rightful and paramount judges of the facts. *State* v. *Wright*, 53 Me., 328.

It may be noticed here, quite as well as anywhere, perhaps, that, in murder, malice aforethought must exist, and, as any other elemental fact, be established, not beyond all possible doubt, but be-

yond a reasonable doubt; malice is not limited to hatred, ill will or malevolence toward the individual slain; it includes that general malignancy and disregard of human life which proceed from a heart void of social duty, and fatally bent on mischief. *Com.* v. *Webster*, supra.

Malice aforethought may be expressed or implied. 4 Bl. Com., page 198. It is express when the wrongful act is done with a sedate and deliberate mind and formed design. It is implied when there is no showing of actual intent to kill, but death is caused by acts which the law regards as manifesting such an abandoned state of mind as to be equivalent to a purpose to murder. Malice includes intent and will. *State* v. *Robbins*, 66 Me., 324, 328.

A wrongful act, known to be such, and intentionally done, without just cause or excuse, constitutes malice in law. *True* v. *Plumley*, 36 Me., 466, 484; *State* v. *Knight*, 43 Me., 11, 137; *State* v. *Albanes*, 109 Me., 199, 83 A., 548.

Malice aforethought implies premeditation. 38 L. R. A. (n.s.) page 1055, note.

> "Under the statute, there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this, it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case." Earl, J., in *People* v. *Majone*, 91 N. Y., 211.

On a prosecution for murder, motive—that is, the cause or reason that induced commission of the crime—is not an essential element. *State* v. *Ward*, 119 Me., 482, 111 A., 805; *State* v. *Brewer*, supra. All the acts of men cannot be explained. However, evidence of motive is admissible for the purpose of furnishing evidence tending to prove guilt, which, in connection with the whole evidence, the jury must consider. Michie, Homicide, Vol. 1, page 708.

Intent, and not motive, governs. Therefore, a conviction for murder may be had, where, without reference to the motive which prompted it, there was an intention to do the criminal act. *State* v. *Jaggers*, 71 N. J. L., 281, 58 A., 1014: *People* v. *Hegeman*, 107 N. Y. S., 261. Sane men are regarded as acting from motive. *State* v. *Neal*, 37 Me., 468, 470; *State* v. *Gilman*, 69 Me., 163.

There was testimony, at the trial, by at least four State witnesses, that on Sunday, July 24, between two o'clock in the afternoon and about seven in the evening, Mr. Crowhurst was seen, alive and well, in and about his place of business; still others, some of them called by the State, and some by the defense, place him there later than that.

Irving Hinckley, who, on the morning of July 25, found Crowhurst's dead body, had come to the station, accompanied by his wife, to buy gasoline. The time, on his estimate, was between eight and nine o'clock. No person, so he said while on the stand, was in sight; blowing of his automobile horn provoked no response; his halloos went unanswered. Witness thereupon entered the building through the usual door, which was closed, but unlocked; he found the shades drawn, and no lights burning; the corpse, which he recognized as that of the man he had known as Mr. Crowhurst, was on the floor, in the entrance of a small door leading behind a bar.

Not only was there blood, a large pool, in the manner of description of this and other witnesses, on the floor, where the man had been felled or overpowered, but there were blood spots on the surrounding walls, five feet, even higher, from the floor. In the victim's clenched fist was some grayish hair, later determined, on test, so a witness for the State testified, to be the dead man's own.

Irving Hinckley's testimony affords room for legally valid inference that, although he looked to see what, in the building, might be seen, he saw there no signs of a scuffle, of ransacking, or of theft. Other witnesses for the prosecution testify in the same tenor.

For the defense, two witnesses suggest the motive of thievery. Of this, more presently.

Evidence introduced by the State is that there was money in the dead man's clothing, rings on his fingers, and a watch in his pocket; a cash register and its contents were apparently intact; a trunk where, in his lifetime, the decedent was accustomed to keep money,

and in which, on the lock being pried and the trunk opened, money was found, was, for anything tending to indicate otherwise, in its usual position, and in nowise disturbed.

Stress is placed by the defense on the fact that the trunk key never has been produced; and on the testimony of Mrs. Evelyn Lawrence, that, to her knowledge, Mr. Crowhurst had, one day two months preceding his death, and in connection with a business transaction to which the witness had been party, made use of a billfold, in which he had money and a checkbook. John Lawrence, husband of the woman, who preceded him on the stand, gave testimony that he had, on several occasions, seen Crowhurst have a pocketbook.

No other witness alludes to the billfold, affirmatively; some say, negatively, that Crowhurst was not known to them to possess anything of the sort. No case for the carrying of money or papers was introduced into the evidence.

Irving Hinckley, to recur again to his testimony, went for help; officers were notified.

The sheriff, a deputy, the medical examiner, and later a police officer from the State force, arrived at the place.

The sheriff and examiner, who came at 9:45 A.M., testify in substantial similarity regarding the condition of the building, and the body of the murder victim.

The examiner, whose testimony has already been adverted to, when questioned further, answered that he examined the body, that "of a man lying crouched, with his legs drawn up, his left arm extended outward . . . , his right arm underneath his body, lying in a pool, a large pool of blood . . ."

In the examiner's opinion, death had occurred about twelve hours earlier.

There is testimony that, on the evening of the 24th of July, John and Vida Young, husband and wife, a small child of theirs, and Howard Merry (the latter respondent) arrived, in the Merry automobile, at five or ten minutes before eight o'clock, at the Crowhurst filling station. The Youngs, witnessing, both state that their stay was a brief one; that the respondent took them to their home, which, in the course of fifteen minutes, he left, driving back in the westerly direction from which he, and they, had come.

Other witnesses testify to the identity of an automobile, which they saw in front of Crowhurst's, both at 7:50 and at 8:30 o'clock that evening; at the earlier time, the car is described as heading east; one witness attests that he saw Mrs. Young in the car; on the latest occasion, the vehicle, so is testimony, was headed west; it was parked, unattended, unlighted. These witnesses, four in number, say the automobile was respondent's.

Investigating officers interviewed Merry, first at his sister's home in Franklin, where he lived, and later in Ellsworth, where he worked in a garage.

From the Crowhurst filling station to that part of the town of Franklin where respondent's sister's house is, was, over the road, by the shortest route fifteen and five tenths miles; otherwise it was, one way, nineteen and eight tenths miles, and another, twenty-two and eight tenths miles.

An investigating officer, Lawrence Upton, when examined as a witness, quoted the respondent as having said, on interview:

That on Sunday, July 24th, he worked in the Ellsworth garage until about noon; after lunch he went to the home, in that city, of a family named Beal, where one Ada Young was employed; thence to his sister's in Franklin, where he took off his work clothes and dressed in his best outfit, this comprising a white shirt, blue serge suit, and white shoes with black leather trimmings. The officer stated that he and others were later told by respondent that these and the work clothes, some extra shirts and shoes, were his entire wardrobe.

The respondent, so the officer continued, said that from his sister's he went, in his automobile, to the home of Mr. and Mrs. John Young, one half mile east of the Crowhurst station. He had supper with the Youngs, after which, accompanied by them and a small daughter of theirs, he proceeded in his car to Ellsworth, and back to the Beal home, where the Youngs called to see Ada, their daughter. The respondent, as his statements are testified to, did not go into the house, but remained in the car; Ada came out with her mother, and there was a brief conversation at the automobile; then they left. After a short stop or two in the city, they started away about seven o'clock; they drove to Crowhurst's filling station, ar-

riving a little before eight o'clock. The Youngs went into the station, Merry remaining in his car.

From Crowhurst's, (still keeping on with Upton's story of the respondent's statement,) the party went to the Young home; there respondent stayed until about 8:15; leaving, he went to North Sullivan to the house of Norman Hicks, a friend, to invite him to a motion picture theater in Ellsworth. Finding the house dark, and supposing nobody at home, he turned about and started once more toward Ellsworth; the time was now around 8:45 P. M. Appreciating the need for changing his underclothes, which he had not done, respondent went back to his sister's; she had callers; he went to his room, partially undressed, then put on his work clothes and came down stairs; he lunched and helped his sister wash and put away dishes.

Time recitals are mere estimates; besides, here, as elsewhere in the testimony, witnesses are indefinite as to whether reference is to Eastern Standard Time or otherwise; it is common knowledge that, in some towns, daylight saving, one hour faster than official time, is, during the summer season, the system of measurement of time.

To pass, for the present, from what the officer testified was stated by the respondent.

Merry, twenty-eight years of age, was devoted to Ada Young; between them there had been, until the day of the murder, engagement to marry. It is in evidence that the deceased (a man seemingly beyond middle age,) was an obstacle to such devotion. He objected, while Ada was in his employ as a waitress, as she had been during that year, from early June until about July 4th, to respondent's coming to the filling station, and to his waiting, at night, in the yard, for her to be through work.

There is testimony, too, of an altercation, on Saturday night, July 23, at a dance, between the lovers, and, on the following day, (that in the night of which was the homicide,) of the giving back, by Ada, of the ring the respondent had given her. There is also testimony that Merry had learned that she (Ada) was resuming work at the Crowhurst station, and that he said he did not want her to, not considering the place a suitable one for her.

Neither Ada Young, nor any of the four callers at the home of Mrs. Jellison, (appellant's sister,) who were testified to have been

there when appellant arrived home, but who, it is in evidence, had gone when he came back downstairs, were called at the trial, to witness. But, let a word be added instantly: They would, for any showing here, have been summonable either by the State or by the respondent.

Officers made a second call at the Jellison home; in this instance, the respondent was not present. The record discloses inquiry, by the officers, for a pair of light trousers; these, a light brown in color, with darker brown stripes, were brought out by the Jellisons, and taken away by the officials; on a still later visit, they got the blue serge coat and white sport shoes of previous mention. There is nothing on the record to show that the blue serge pants were taken, or subjected to test.

Pathologists called to the stand gave opinion evidence, each in his turn, that, although they determined that spots found on the light trousers, on the right leg from the cuff up, and on the left leg from the knee up, were blood spots, yet, insufficiency of material debarred ascertaining the type of blood. At least two of the several spots found on the trousers, so these witnesses testified, had been sponged. The shoes appeared to have been polished since worn. The coat also had a few small spots below the pocket on the right hand side; these were determined to be blood spots.

There is no occasion for any expert evidence to show human blood spots on the respondent's clothing. There need be no better evidence on this point than the uncontroverted testimony of the investigating officer, who, on the stand, said that respondent had asked if blood had been found on his pants, and volunteered that, a couple of weeks before, he had a nosebleed, and that the spots on the pants came from that; also that the fly of his trousers had been soiled during "sexual intercourse with a girl during her menstrual period." The blood on the blue coat, he is said to have advanced, was from the nosebleed.

It might be noted here that Mrs. Vida Young, while witnessing, testified that respondent had, at her house, about two weeks previously, as the result of a playful accident, had a nosebleed.

Four witnesses for the State identify the respondent's automobile, standing, on the night of the killing, near a corner of the Crowhurst building. Some of them state that it was unoccupied;

others that its lights were not on. The witnesses are in accord that the shades in the building had been drawn; some testify that the place was unlighted; others that lights could be seen by the edge of the curtains. The time is put from eight o'clock on.

Evidence of identity, to abstract freely from Mr. Harris' Treatise on Identification, (section 562 *et seq.*,) although given positively and directly, is, after all, but the mere opinion of the witness, who should be required to give the facts upon which he based his statement, as the jury have a right to it to aid them in their determination of the matter in issue.

One of the modes of identifying personal property, whether in or out of court, is by appearance of the property itself, but, in this matter, as in many others, the weight of the testimony must generally depend upon the knowledge or familiarity of the witnesses with the subject upon which they speak.

To be sure, there is often a mistake, as well in the identity of personal property as in that of persons. Notwithstanding, the most accurate expression of identity of articles of a specific kind is to be found by the witness in the general appearance of the property. Two important things are to be considered: first, the witness' opportunities for observing; second, his attentiveness in observing. In these are found the sources of accurate impression. Harris, Identification, *supra.*

Of the four identifying witnesses, two, Arthur and Addie Johnson, husband and wife, had seen the car before, in the custody of its owner, whom they knew by sight. On that night, their testimony placed the car as headed west; the time, between 8:20 and 8:30. Their identifications had been verified by a subsequent inspection of the vehicle, made at the instance of the officers.

Mahlon Witham and Lulu Witham were the other witnesses who attested that the respondent's car was at the Crowhurst station. Mr. Witham, in testifying, said that as they (he and his wife) were riding by, he had it in mind to call on Crowhurst; he did not do so because someone was already there; glancing, he thought the car was Merry's. He saw it, on first going by, about 7:50 P. M., headed east; later, on the return journey to their home, the car was headed west; this around 8:30 P. M. On seeing the car again, shortly in advance of the trial, he recognized it. Mrs. Witham said she knew the

car as the one in which, on the afternoon of the night that she saw it at the station, she had, in company with Mrs. Young, ridden a short distance; she testified further that, at that time, the respondent was wearing, as she remembered, light trousers, and a dark blue coat, or sweater.

But the defense offers evidence in disproof of the statements of the government witnesses in regard to the presence of respondent's automobile at the station after he brought the Youngs there, shortly before eight o'clock. Witnesses were introduced, three in number, each of whom gave testimony as to seeing Mr. Crowhurst, alive, at his station, as late as nine o'clock that evening, as they rode by the place.

The defense endeavors to prove an alibi.

Olive and Maynard Jellison, respondent's sister and her husband, both swear that a little after nine o'clock, on the fatal night, the respondent was at their home, (where, as noticed hereinbefore, he lived,) to go to bed.

No other person testified in such behalf.

Other testimony for the defense tends to place other cars than that of the respondent in the Crowhurst yard that evening.

Evelyn Lawrence, a witness of earlier mention, testifies that she, with her husband, passed the filling station, in their car, about 8:15, on the evening of July 24th. She swears to seeing Mr. Crowhurst putting gas into a Rhode Island car, and that, fifteen minutes later, when traveling the road in the opposite direction, they met the same Rhode Island car, an old sedan of a dirty green color. Further, that after the Rhode Island car went by, they met a Chevrolet sedan, (Maine license) which slowed almost to a stop; that, as their car was slowed down, the sedan went into a driveway, turned, and followed them. She describes the driver of this car, saying he was a man between twenty-five and thirty years of age, that he had dark hair and heavy side whiskers, wore no coat, but had on a "garage" cap, with an emblem on the front. The witness is confident that, as she and her husband were returning home, and were, at 8:30 o'clock, passing Crowhurst's, there were no cars at his station, no one in sight about the place, and no lights on — "no need of any."

This is one of the witnesses who testified respecting the billfold.

The force of her testimony might, or not, have been damaged by the development, on her cross-examination, that in a signed account which, shortly after the tragedy, she gave investigating officers, she made no reference to the Chevrolet car or to its driver.

On recall to the stand, by defense counsel, the witness stated that this was because she was not aware that it would be of any bearing on the case. She also made corrections in certain of her testimony, not important to specify.

Mrs. Lawrence was corroborated, in the main, by her husband, John Lawrence, when he witnessed.

Still more witnesses, introduced by the defense, whose testimony is insisted as showing the presence at the filling station of cars, not inclusive of the respondent's, were Ethel Parker and her two sons.

Mrs. Parker, as a witness, testified that, on the particular evening, about nine o'clock, they drove by the Crowhurst place, twice, the intervening interval being short. She is definite that she saw, at the filling station, a parked automobile, — a coupe, — the lights of which were on; near the coupe were two men; one was Mr. Crowhurst, who was holding a gas hose. Witness had purposed stopping to buy cigarettes, but, Mr. Crowhurst being busy, she did not stop. Mrs. Parker testifies that on coming back, the lights in the station were out; the place was dark; no person was in sight. The coupe was still there, but unlighted; it was headed west.

Mrs. Parker's sons, Richard and Victor, aged thirty-two years and twenty-seven years, respectively, were riding with their mother. They swear to seeing Mr. Crowhurst and another man; they testify, too, respecting the car and the filling station, similarly to their mother.

Kenneth Strout and his wife, Pauline, called as witnesses by the defense, severally testify that at 10:30 P.M., the Crowhurst place was unlighted; that, on a public road, the course of which intersects that near which the filling station sets, was an automobile, its lights shining on the station; the lights went off as the witnesses' car approached.

Another witness for the defense, Byron Bunker, who passed by Crowhurst's just before nine o'clock that night, testified to seeing a car in the yard, headed west; he stated that it was a closed car, but did not otherwise describe it.

The power of the case of the prosecution does not depend entirely upon the testimony thus far outlined, and other more or less cumulative testimony as to respondent's car being at the filling station, and when it was there no longer.

The State urges that the testimony of Richard Ash, and of Warren Clark, being accepted by the jury, and believed by them, is evidence significant of the guilt of the respondent.

Richard Ash, twenty-three years old, and of two years' acquaintance with Merry, lives in Eastbrook. Questioned, he answered as follows:

"Q. Whether or not you saw Mr. Merry on the last day of July? On the 30th day of July did you see Mr. Merry?
A. I did.
Q. Where?
A. At Eastbrook; at my home.
Q. That was on Saturday?
A. Yes, sir.
Q. Did you have some conversation with him?
A. I did.
Q. Will you state what the conversation was?
A. Well, he wanted me to say that I saw him in the vicinity of Hancock between the time of half past eight and nine.
Q. On what date?
A. On the last Sunday, the Sunday before the Saturday.
Q. That was the day of the Crowhurst . . .
A. Murder, yes; the evening of that.
Q. What else did he say to you about it? Did he offer to pay you anything?
A. He did.
Q. Well, state just what he offered to do.
A. Well, he said if I would say I saw him in the vicinity of Hancock at that time he would pay me or do anything I would want him to do for me.
Q. Did he tell you where in Hancock he wanted you to see him? (Objection)

The Court: He may be asked to state the whole conversation. State everything he said.

A. Well, he said somewhere in the vicinity of Springer's garage.

Mr. Blaisdell: And Springer's garage is how far north of the Hancock-Sullivan bridge, if you know?

A. I don't know, but it seems to me it would be about two miles and a half.

Q. Who did he want you to make that statement to?

A. He wanted me to go over to Ellsworth and tell it to Lieutenant Upton.

Q. What did you tell him?

A. I told him I didn't want to do it.

Q. Did you refuse to do it?

A. I did.

Q. Did he say anything more about the officers?

(Objection)

The Court: He may proceed and state the conversation.

A. All he said — he said the officers had been to see him about it.

Mr. Blaisdell: What else did he say in connection with it? They had been to see him about what?

A. Well, they had been talking over about him being down in the vicinity of Gouldsboro on that Sunday night.

Q. What else did he say about the officers?

A. He said they were going to see him again that Sunday night, I think, after this Saturday, the 31st day of July. They were going to talk with him about the matter of him being down there.

Q. Now will you re-state again exactly what Mr. Merry said to you about paying you for testifying?

(Objection)

The Court: Well, he may state.

A. Well, he said he would give me an amount of money, or he would do anything I wanted him to if I would say I saw him down there at that certain time, between half past eight and nine.

Q. At half past eight or nine in the evening?

A. Yes, between that time.

Q. That was on July 24th? That was the night he was referring to?

A. Yes, on Sunday.

Q. Who was with Mr. Merry when he came to your house?
A. Warren Clark."

The cross-examination brought out that, on being interviewed by the officers, the witness at first said he might have seen him (respondent) down there (Springer's garage, in Hancock). The story to the officers was later changed.

Warren Clark, also of Eastbrook, testified, in answer to questions, in this wise:

"Q. What did Mr. Merry say to you?
A. What did he say to me?
Q. Yes.
A. He didn't say anything to me, not at Ash's home.
Q. What did he say to Mr. Ash?
A. As near as I can remember — I didn't pay much attention to it, but he wanted him to testify that he saw him at somewhere between Hancock bridge and Franklin Roads, or in that vicinity, somewhere between half past eight and nine o'clock.
Q. On what night?
A. On Sunday night before this — Saturday night before that.
Q. Was Springer's garage mentioned?
A. I don't remember.
Q. Now did he want you to make any statement?
A. He did.
Q. And will you state what that conversation was?
A. He said at his home, or at mine . . .
Q. At his home and at yours both?
A. He didn't say anything to me at his home; he was talking to Dick.
Q. When you say 'his home' you mean Ash's home?
A. Yes.
Q. You went to Ash's home with Merry?
A. I did.
Q. Where did he pick you up?
A. At my home.
Q. What did he say to you at your home?
A. He came to me and he says 'Warren, the cops are after me,' or 'the State is after me,' and I asked him 'What for?' and he says 'For the murder of Crowhurst,' and I asked him if he did

it, and he said 'No,' and then he asked me if I was a friend to him, and I told him 'Yes,' and he wanted to know if I would help him out, and I told him I would do anything I could, and he asked me if I would testify or tell the sheriff, say to Sheriff Harold Hodgkins that I saw him between the Hancock-Sullivan bridge and Franklin Roads, or in that vicinity, in the vicinity of Springer's Hill, or somewhere down there.

Q. On what night?

A. On the 24th, Sunday before.

Q. Did he offer to pay you anything?

A. That I don't quite remember.

Q. Now where did he want you to go to make that statement to Mr. Hodgkins?

A. He wanted me to go to Ellsworth then, where he was working.

Q. What did you tell him?

A. I told him that I didn't feel as if . . . I told him . . . I don't remember just what I did tell him. I think I said . . .
(Objection) (Question read)

The Court: He may answer.

Mr. Blaisdell: Now will you answer that question.

A. I told him that I would come over to the garage, but I didn't feel like doing it.

Q. Did he tell you when he wanted you to come to the garage?

A. He wanted me to come that Sunday afternoon.

Q. That was the . . .

A. Sunday after the Saturday night.

Q. That would be July 31st?

A. I presume so, yes.

Q. Now did you go to the gararge where he was working?

A. Not that afternoon.

Q. Did you go later on?

A. Yes, I did after I got through work.

Q. What did you tell him then?

A. I told him I didn't want to do it.

Q. And did you refuse finally to do it?

A. Yes.

Q. Were you in the vicinity of Springer's garage on the night of July 24th?

A. I was not.

Q. Did you state what time it was that Mr. Merry wanted you to place him between Hancock-Sullivan bridge and Franklin Roads, that night?

A. Well, approximately half past eight to nine o'clock."

Nothing on the record seems expressly to soften the impact of the testimony of Richard Ash and that of Warren Clark.

The defense argues that, adverse circumstances surrounding and endangering him, the respondent, though innocent, did, to escape the clutches of accusation, what, in emotion, seemed to him a prudent thing to do, namely, to seek men he believed he had passed on the road, on the evening of the day this case involves, to go to the officers and say when and where they had seen him.

That respondent thought, or had reason to believe, that he had met, or passed by, these young men, is not predicable on the printed record.

The statement testified by the police officer as made by Merry — in substance that, on leaving Young's, and before deciding to spend the night at his sister's, he was at the house of his friend, Norman Hicks, only to find the house in darkness, and its general appearance to indicate the occupants away, or in bed for the night, is at variance with the testimony of Mr. Hicks, and that of his mother; they say, each of them, that at the hour the officer testifies to as having been stated to him, their house lights were on, and remained burning, with the shades not drawn, for some time.

William A. Emery, Jr., respondent's employer, testifies to Merry coming to the garage, in Ellsworth, to pump up tires and get oil, sometime on Sunday, later than two o'clock, the hour he quitted work for the day. This witness swears that he noticed respondent was wearing his blue suit.

William M. Emery, son of the employer, testifies that he noted that on Sunday afternoon, respondent had on a blue serge coat and blue serge trousers; witness' attention was directed to the garments because he and respondent sometimes exchanged clothes.

Olive Jellison, respondent's sister, testified that, on Sunday night, about 9:15 o'clock, when her brother came home, she and her husband were entertaining callers, four in number. She says she consulted the clock because her callers were about leaving. She states that the respondent, who had on blue coat and pants, entered

the house by the front door, spoke, and went upstairs to his room. About ten minutes later, (the callers having meantime gone,) he came down, wearing his work trousers, white shirt and house slippers. He had a lunch, helped his sister wash and put away dishes, and went back up to bed. Ten minutes after, when witness herself went upstairs, her brother was apparently asleep, the door open into his room.

Maynard Jellison, husband of the preceding witness, testifying, agrees substantially with her; he is explicit that the respondent, on his arrival home, was dressed in blue pants and coat, later coming down from his room with his work pants on.

In a criminal prosecution, the law casts upon the State the burden to prove the guilt of the accused, not by a mere preponderance of the evidence, but beyond a reasonable doubt.

As the term is used in instructing juries in criminal cases, a reasonable doubt is not a vague, fanciful or speculative doubt, but a doubt arising out of the case as presented, for which some good reason may be given, and such a doubt as, in the graver transactions of life, would cause reasonable, fair-minded, honest and impartial men to hesitate and pause. 8 R. C. L., 220; *State* v. *Reed*, 62 Me., 129, 143.

If, at the trial of a case, there is a conflict in the evidence, the jury must, so far as possible, reconcile the testimony before it; if the evidence given by different witnesses presenting different states of fact, cannot be reconciled by the jury, then the triers must determine what part of the evidence is credible and worthy of belief, and determine the relative weight of testimony. *State* v. *Howard*, 117 Me., 69, 102 A., 743; *State* v. *Ward*, supra.

The record presented a fair question of fact, within the function of the jury to decide. The jury was required to settle material conflicts in the testimony; the determination of the triers of fact, as reflected in their verdict, shows that they apparently resolved such conflicts in favor of the State.

By their verdict, the jurors have declared that their contemplation, upon the whole record, of the evidence of facts and circumstances pointing to the guilt of the respondent, leaves no reasonable doubt in the mind of any member of the panel, as to the truth of the accusation contained in the indictment; and that such evi-

dence is lacking in agreement with the presumption of the respondent's innocence.

It remains for the judges of the law to announce their conclusion, that the evidence sufficiently supports the verdict.

The mandate must be:

Exceptions overruled.
Appeal dismissed.
Motion for new trial denied.
Judgment for the State.
Case remanded for sentence.

PUBLIC UTILITIES COMMISSION

vs.

UTTERSTROM BROTHERS, INC. ET AL.

Kennebec. Opinion, September 12, 1939.

PUBLIC UTILITIES COMMISSION. CARRIERS.

A contract carrier, exercising right to load, transport, and deliver goods, does not ipso facto *become competitor of, and perform substantially same service as, common carrier within statute requiring Public Utilities Commission to prescribe rules for operation of contract carriers in competition with common carriers over highways and minimum contractural rates not less than those of common carriers for substantially same or similar service.*

The right granted by statute to contract service in transporting merchandise over highways should not be lightly ignored, and all contract terms and conditions should be considered in determining question of substantial similarity of purpose of such service to that of common carriers within statute requiring Public Utilities Commission to prescribe contract carriers' minimum rates not less than common carriers' rates for substantially same or similar service.

When rulings of the Public Utilities Commission are based upon its findings of fact, the Law Court has no right to sustain exceptions on questions of fact if there be any evidence to sustain the findings.

The Public Utilities Commission, upon undisputed facts, is required to interpret the statute and apply the law to the facts, thus presenting a legal question.

Whether on the record, any factual findings underlying order and requirement, is warranted by law, is a question of law, reviewable on exceptions.

On exceptions. Proceeding by Public Utilities Commission against respondents to compel them to cease and desist from transporting freight and merchandise as contract carriers at rates less than common carriers' minimum rates prescribed by the Commission. Respondents filed exceptions to the Commission's rulings and decision. Exceptions I and IX sustained. The Clerk of this Court to so certify to the Clerk of the Public Utilities Commission, and to the Clerk of the Superior Court for Kennebec County in accordance with P. L. 1933, Chap. 6. Case fully appears in the opinion.

Frank M. Libby, for the Commission.

Albert E. Anderson, for respondents,

Locke, Campbell & Reid, *Raymond S. Oakes* } of counsel for respondents.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. On exceptions to rulings and decision of the Public Utilities Commission.

The Great Atlantic and Pacific Tea Company, hereafter called by its more familiar designation, A. & P., maintains numerous retail stores throughout the State of Maine. It owns and operates a warehouse at Portland and employs several contract carriers to transport over the highways merchandise to its stores. These contract carriers are the respondents in the present case. On its own initiative, the Public Utilities Commission ordered a hearing upon the rates charged for transportation service by the respondents upon the ground that they were less than those prescribed by a general order adopted by the Commission under authority of Sec. 5 (4) P. L. 1933, Chap. 259, as amended by P. L. 1935, Chap. 146.

The Commission ruled that the respondents were operating in competition with common carriers and were performing substantially the same or similar service, and the respondents were ordered to cease and desist from transporting freight and merchandise unless at rates not less than the minimum rates of common carriers.

Two classes of service to shippers for the transportation of goods by the use of motor trucks on the highways are recognized and provided for by the laws of our state. P. L. 1933, Chap. 259, as amended by P. L. 1935, Chap. 146. One is the transportation by trucks operated by common carriers. Such carriers are required to serve the general public. They operate over designated routes and upon fixed schedules and transport the goods of any shipper. The other is the transportation service furnished to an individual shipper by a private contract carrier.

Common carriers must secure permission from the Commission to operate upon the highways, and must show that public necessity and convenience require and permit such operation. They must file schedules of rates, which are subject to the approval of the Commission, and which rates so fixed must be paid by the shipper.

Contract carriers must likewise obtain a permit from the Commission. When the provisions of P. L. 1933, Chap. 259, became effective these respondents by its terms became entitled as a matter of right to such permit, as they were engaged in the business of contract carriers, as defined in the act, prior to March 1, 1932.

Sec. 5 (D) of said Chap. 259 provides:

> "The commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this state, and the commission shall prescribe minimum rates and charges to be collected by contract carriers which shall not be less than the rates charged by such common carriers for substantially the same or similar service."

The position of the respondents is that they are not in competition with common carriers as described in the section quoted above, that they do not render substantially the same or similar service as a common carrier and are, therefore, not within the purview of the act with relation to rates.

It is contended by the respondents that there are fundamental distinctions between the service rendered by them to the A. & P. and the service of common carriers. Being under no obligation to serve anyone but the A. & P., an entirely different scheme of transporta-

tion is set up. The facilities which would be necessary if the general public were to be served, and the expense attendant thereon, are eliminated. They serve but one shipper. They are provided with full employment for their trucks by that shipper. The compensation paid is a matter of private contract mutually agreed upon and satisfactory to both parties. There is but one paymaster. The work is more efficiently carried on. The respondents are not required to operate over regular routes or on fixed schedules. The trucks are operated upon a schedule to meet the shipper's needs, and practically 24 hour service is provided. Bread, fruit and perishable goods are routed for quick delivery to the stores of the shipper in various localities. The A. & P. maintains an organization and adopts methods to facilitate the transportation, which lessen the cost of operation to the contract carrier. The public is protected by the same regulations as to safety appliances, equipment, weight, height, load, and operation of the trucks as apply to common carriers. The number of trucks on the highway is not increased, and may well be less. It is urged that the convenience of highway transportation direct from warehouse to the various stores, with no other goods carried, and no other deliveries to make, places the service upon an entirely different plane, which could not be provided by common carriers. These distinctions, with other elements mentioned and recognized by the Commission in its findings, it is claimed demonstrate that there is no competition and no substantial similarity; and that to compel higher rates will not transfer the business to common carriers as their service is not adapted to the needs of the A. & P., but will force the shipper to transport the goods himself, via the highways, to the destruction of the respondents' business, or if such transportation proves infeasible, to needlessly add to the cost of goods to the consumer.

The respondents contend that certain statements of the Commission in its findings, and upon which its conclusion that competition and similarity of service are shown, demonstrate exactly the opposite. They call attention in particular to the following excerpts:

"The contract type of carrier service is better adapted to the need of The Great Atlantic and Pacific Tea Company." Again: "It is perfectly true that it is probably more convenient for the Company to use contract carriers which it can order in at various hours

of the day, as the shipments are made up and prepared for delivery to the carrier." And again: "It is probably doubtful if the business could be expedited nearly as satisfactorily as under the present contract carrier method." Again, the respondents assert that loading is as much a part of transportation as is movement. The A. & P. dealing with contract carriers has adequate room in its warehouse to load vehicles, because trucks are supplied as and when needed, while the Commission finds that such room is not available when dealing with common carriers unless such carriers depart from their present service.

Respondents acknowledge that certain trucking concerns operating as common carriers furnish transportation to the A. & P. but assert that the record shows that they are used but little as compared with the total volume of transportation, and such use is at considerable inconvenience in order to care for stores in a few scattered localities and in areas not adequately served by the contract carrier system, while the contract carriers are used to provide the great volume of transportation in other areas because the flexible nature of the system is peculiarly adaptable to the needs of the shipper.

Reference is also made to the findings by the Commission that the personal relations between contract carriers and the company enable delivery of merchandise in the absence of the consignee, and that the system in general provides a saving of costs to the carriers in bookkeeping, collection of accounts, operation of terminals and solicitation of business, and comment is that all these elements show substantial dissimilarity of service.

These contentions of the respondents must be sustained. The finding of the Commission is based solely and squarely upon the assumption that carriers who receive loads at the warehouse and transport them over the highways are engaged in substantially the same business, and that the transportation of goods for such a shipper as the A. & P. must be done at common carrier rates, regardless of the inability of common carriers to perform the service adequately, regardless of convenience to carrier, shipper and consignee alike, and regardless of cost or public welfare.

The legislature authorized both contract and common carrier methods of highway transportation. It permits contract carriers

to operate, receiving compensation mutually agreeable to the parties, so long as such contract carriers do not compete with common carriers in substantially similar service, yet every contract carrier and every common carrier must necessarily operate trucks on the highways, travel to the warehouse, procure loads and deliver goods to consignees, which acts or functions form, according to the reasoning of the Commission, the criterion of similar service. It can not be said to be the intent of the legislature that any contract carrier who exercises the right to load, transport and deliver goods *ipso facto* becomes a competitor of common carriers and performs substantially the same service.

The brief for the Commission relies on cases construing the discriminatory provision of the Interstate Commerce Act. It cites *Wight* v. *U. S.*, 167 U. S., 512, 17 S. Ct., 822; *Penn. RR Co.* v. *International Coal Mining Co.*, 173 Fed., 1; *I. C. C.* v. *B. & O. R. R.*, 225 U. S., 326, 32 S. Ct., 742, 747, as restricting the interpretation of "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" to the single element of carriage between given points.

It is to be borne in mind, however, that the act there considered was one designed to prevent common carriers from granting preferential rates to favored customers. As between a common carrier and its shippers, the law forbade discrimination. In *I. C. C.* v. *B. & O. R. R.*, supra, the court took occasion to point out:

> "It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges."

Such is not the case here. It is the relation of one carrier to another, under different classifications.

The right of contract service thus granted should not be lightly ignored and all the terms and conditions of the contract should be considered in determining the question of substantial similarity of purpose.

The case of *Wight* v. *U. S.*, supra, was one of offering a special inducement to a shipper by which he was allowed a rebate to cover

the cost of cartage from the depot to his warehouse. This was done to secure a transfer of the business from a competing railroad. Another shipper of like goods between the same points was charged the established tariff. The opinion points out:

> "The wrong prohibited by the Section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another."

That the construction of Sec. 2 of the Interstate Commerce Act against discrimination was limited to cases specifically arising thereunder is emphasized by the court in its further statement:

> "It may be that the phrase 'under substantially similar circumstances and conditions' found in section 4 of the Act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition."

The Circuit Court case of *Penn. RR.* v. *International Coal Co.*, supra, was based upon the same section of the Interstate Commerce Act, and to like effect.

The principles laid down in the cases sustaining the rulings of the I.C.C. under the law prohibiting discrimination by common carriers in their dealings with their patrons, were not regarded as controlling or as precedents by the I.C.C. itself when that Commission considered applications for contract carrier permits. The issuance of such permits depended upon whether there would ensue competition with a service similar to that of common carriers, a question analogous to the one now under scrutiny. The following instances cited by the respondents of permits granted in 1938, are illustrative:

In *Ryan* Contract Carrier Application 9-ICC, 537:

> "Common carriers cannot give the cooperation and the individual service which a contract carrier renders and which is re-

quired in the transportation of beer. A contract carrier is at the call and demand of the other contracting party."

In *Martin* Contract Carrier Application 9-ICC, 542, appears the following:

> "By having his equipment entirely at the disposal of the shipper, applicant is able to render a more prompt and convenient service than can ordinarily be rendered by a common carrier serving the public generally. . . . He is able to meet the shipper's demands for transportation speedily and upon short notice."

In *Arbaugh* Contract Carrier Application 9-ICC, 299, it was stated:

> "As a consequence of several years experience in serving one shipper, applicant has been able to meet the requirements for dependable and prompt delivery. Such service is well adapted to the shipper's needs and has been very helpful in enabling shipments to move with regularity from the plant to the destination."

In *Dyer & O'Hare Co.*, T-6003, the Public Service Commission of Missouri in 1938, in acting upon contract carrier application, was required to construe a statute passed by the legislature in 1937, which became a part of R. S. of Mo., Secs. 5270 and 5271, and which contained the following provision:

> "In determining whether or not a permit should be issued, the Commission shall give reasonable consideration to the transportation service being furnished by any railroad, street railroad, motor carrier, or contract hauler, and the effect which such proposed transportation service may have upon other transportation service being rendered."

The following statement by the Commission shows that it passed upon a situation like that under consideration:

> "The service proposed by this applicant is different from that offered by common carriers. Perforce a common carrier cannot do the things this applicant proposes. It must of neces-

> sity on account of its many patrons maintain regularly established schedules while applicant can stand by with its entire fleet of equipment for a 24 hour demand service. The common carrier must maintain its depots and warehouses, its agents and solicitors while this applicant with its one client avoids all of these requirements, and is able to render a type of service to the shipper which would require the facilities of several common carriers to duplicate. . . . The applicant owing to its close personal relationship with its one shipper is given store keys and when the necessity arises can go into the many stores alone to complete deliveries or can without further instruction from its main office transport from one store to another excess commodities. These many things make up a service peculiarly adapted to the type of business carried on by this particular shipper."

It is further contended in the brief for the Commission that its rulings were based upon its findings of fact and the court, though it may disagree with the Commission, has no right to sustain exceptions on questions of fact if there be any evidence to sustain the findings, citing *Hamilton* v. *Power Co.*, 121 Me., 422, 117 A., 582; *Gilman* v. *Telephone Co.*, 129 Me., 243, 151 A., 440; *P. U. C.* v. *Water Comm.*, 123 Me., 389, 123 A., 177. Such is undoubtedly the law. The facts as to the kind of service rendered by the contract carriers in the present case are not in dispute. The Commission frankly stated them as they appear of record. Nor is there controversy as to the character of the service which is, or would be, rendered by common carriers. The Commission, however, upon the undisputed facts, was required to interpret the statute and apply the law to the facts. Thus a legal question was presented. The Commission did not correctly interpret the meaning and intent of the law. As said in *Gilman* v. *Telephone Co.*, supra:

> "Whether, on the record, any factual finding, underlying order and requirement, is warranted by law, is a question of law, reviewable on exceptions."

The exceptions on the questions herein discussed must be sustained. The respondents, in event their exceptions in the foregoing respects were not sustained, and the law were construed in ac-

cordance with the holding of the Commission, raised objections to the constitutionality of the statute, but these exceptions, in view of this opinion, need no consideration.

Exceptions I and IX sustained. The Clerk of this Court to so certify to the Clerk of the Public Utilities Commission, and to the Clerk of the Superior Court for Kennebec County in accordance with P. L. 1933, Chap. 6.

HAROLD E. ARNST

vs.

CHARLES L. ESTES AND THOMAS B. HARPER.

Somerset. Opinion, September 13, 1939.

NEGLIGENCE. TORTS. MOTOR VEHICLES. JUDGMENTS. EVIDENCE.

Under liberal rules as to joinder, defendants whose negligences coalesced to produce a single result have been joined in one action, and have become at once joint tortfeasors.

Where, without concert, and although there was no common design, the negligences of two or more defendants concur in producing a single indivisible injury, such persons are jointly and severally liable for the whole damage. If each contributes to the wrong, the "proximate cause" is the wrongful act in which they concurrently participate.

When two motorists, by their simultaneous negligence, come into a collision with harm following as a direct consequence to a third person, a "joint tort" has been committed.

In case of a "joint tort" the causes, as the word "concurring" signifies, run together to the same end, but the tortfeasors are "joint tortfeasors" merely in the sense that they may be joined as defendants by one who has suffered injury or damage by reason of their independent but concurring wrongs.

Entire liability in concurring cases rests upon the fact that each defendant is responsible for the loss, and the absence of any logical bases for apportionment.

Where two or more defendants are jointly charged for negligence, and a nonsuit is directed as to one of them, such nonsuit, even if erroneous as to the plaintiff, is not such error as may be invoked by the other defendant for a reversal.

The joint liability a declaration sets out need not be proved.

In torts arising out of concurrent negligence, there is an independent as well as a joint liability, and a joint tortfeasor cannot complain that, as to his co-defendant, there has been nonsuit, discontinuance or favorable verdict.

Generally, an action against alleged joint tortfeasors is considered as being both joint and several.

A motion for a nonsuit is tantamount to a demurrer to evidence.

In ordering a nonsuit for insufficiency of plaintiff's evidence, the court simply declares the law applicable thereto. It says the facts proven fail to cast liability on defendant, but the court does not, nor could, attempt to determine the actual facts of the case, nor is judgment of nonsuit bar to a subsequent action for the same cause.

The common-law rule applicable in actions of assumpsit, that if one defendant is not proved liable, the verdict must be in favor of all the defendants, does not apply in tort actions.

Where the action is on a joint contract, the statutes of Maine provide for individual judgments if the defendants are not found jointly liable.

When, on a motion for a new trial on the ground that the verdict be set aside because of excessiveness in the award of damages, the motion is not argued, it is considered abandoned.

The standard of "negligence" is that of reasonable care.

A verdict clearly against the weight of the evidence should be set aside, and a new trial granted.

The weight of evidence depends on its effect in inducing belief. The question is not on which side are the witnesses more numerous, but what, in convincing power, is outweighing.

The established rule is — it is the province of the jury to weigh conflicting testimony; and the court will be slow in disturbing a verdict unless there is sufficient to make it appear that the verdict was clearly against the weight of evidence.

To support a verdict, there must be evidence of real worth. The evidence must be reasonable, and so consistent with the circumstances and probabilities in the

case as to, on contrast with and weighing against the opposing evidence, raise a fair presumption of its truth. Overwhelmed by opposing evidence, a verdict cannot stand.

The decision reached by triers of fact must have a sound basis and be arrived at by a logical process in order to be accepted as final in a last court of resort.

On motion and exceptions. Action by Harold E. Arnst against Charles L. Estes and Thomas B. Harper for personal injuries and property damage claimed to have been caused by the concurrent negligence of defendants in operating their automobiles, wherein a judgment of nonsuit was entered as to first named defendant at the close of plaintiff's evidence, and a verdict was thereafter returned in favor of plaintiff against the last named defendant. On general motion for new trial and exception by the last named defendant. Exception overruled. Motion sustained. New trial granted. Case fully appears in the opinion.

Gower & Eames,
Frederick P. Hanford, for plaintiff.
F. Harold Dubord, for defendant, Thomas B. Harper,
Locke, Campbell & Reid, for defendant, Charles L. Estes.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. The plaintiff brought his action for tort against two defendants, namely, Charles L. Estes and Thomas B. Harper. He averred that they were owners and operators, respectively, of a taxi and an automobile, and that, though their duties to him were diverse and disconnected, yet their several neglects, concurred and united together, had been the efficient cause of injury to himself personally, and of damage to his property. He alleged the asserted wrongdoers jointly and severally liable to him in damages.

He amended his declaration, before the case was put on trial, by striking out all reference to several negligence. The defendants filed separate pleas of the general issue, and each set up that the negligence of the other defendant, not his, caused the accident. Contributory negligence was not in issue.

After plaintiff had put in his evidence, and rested his case, de-

fendant Estes' lawyer moved, in his behalf, (the grounds of the motion are not on the record,) judgment of nonsuit. The plaintiff, and as well defendant Harper, through their lawyers, interposed objection.

The motion was granted. Judgment of nonsuit was entered. Both plaintiff and defendant Harper reserved exception.

The trial proceeded, as to defendant Harper alone, to verdict against him.

His exception, and general motion for a new trial, have been argued. The plaintiff, on gaining the verdict, did not perfect the exception he had caused to be noted.

Under liberal rules as to joinder, defendants whose negligences coalesced to produce a single result have been joined in one action, and have become at once, by rather inaccurate usage, "joint tort-feasors." *Feneff* v. *Boston & Maine Railroad*, 196 Mass., 575, 82 N. E., 705; *Allison* v. *Hobbs*, 96 Me., 26, 51 A., 245; *Gordon* v. *Lee*, 133 Me., 361, 178 A., 353.

Exceptions to these rules are not here important.

Where, without concert, and although there was no common design, the negligences of two or more defendants concur in producing a single indivisible injury, such persons are jointly and severally liable for the whole damage. *Brown* v. *Atlantic Coast Line R. Co.*, 208 N. C., 57, 179 S. E., 25. If each contributes to the wrong, the proximate cause is the wrongful act in which they concurrently participate. *Brown* v. *Thayer*, 212 Mass., 392, 397, 99 N. E., 237. See, too, *Carpenter* v. *McElwain Co.*, 78 N. H., 118, 97 A., 560; *Lavenstein* v. *Maile*, 146 Va., 789, 132 S. E., 844; *McDonald* v. *Robinson*, 207 Iowa, 1293, 224 N. W., 820, 62 A. L. R., 1419; *Town of Sharon* v. *Anahama Realty Corp.*, 97 Vt., 336, 123 A., 192. It is like the instance of a man injured by falling into a hole dug partly by one person and partly by another. *Churchill* v. *Holt*, 131 Mass., 67.

A common case is that of two vehicles which collide to the hurt of a third person. The duties which are owed to the plaintiff by the defendants are distinct, and may not be similar in character or scope, but by far the greater number of courts now permit joinder in one action. It is difficult to imagine a more typical case of what is commonly called a joint tort, than the case of two drivers who, by their

simultaneous negligence, come into a collision, with harm following as a direct consequence to another. *Kilkenney* v. *Bockius*, 187 Fed., 382.

The causes, as the word concurring signifies, run together to the same end. *Herr* v. *Lebanon*, 149 Pa. St., 222, 24 A., 207. The term "joint tortfeasors" is misleading, to say the least. In cases such as plaintiff declares, the tortfeasors are joint in no other sense than that they may be joined as defendants by one who has suffered injury or damage by reason of their independent but concurring wrong. The right of action arises from disconnected conduct, which concurred to consummate the injury. The liability of each defendant grows out of an entirely variant set of facts. See Judge Owen's opinion in *Bakula* v. *Schwab*, 167 Wis., 546, 168 N. W., 378.

Entire liability in concurring cases rests upon the fact that each defendant is responsible for the loss, and the absence of any logical basis for apportionment. Article in 25 California Law Review, 413, May, 1937, on Joint Torts and Several Liability. A dictum in *Sessions* v. *Johnson*, 95 U. S., 347, 24 Law ed., 596, is to the same effect. There is no yardstick with which to measure the two acts of negligence, nor scales with which to weigh them. This is the language of Winslow, C. J., dissenting, in *Dohr* v. *Wisconsin Central R. Co.*, 144 Wis., 553, 554, 129 N. W., 252, 255.

Where two or more defendants are jointly charged for negligence, and a nonsuit is directed as to one of them, such nonsuit, even if erroneous as to the plaintiff, is not such error as may be invoked by the other defendant for a reversal. *McCamley* v. *Union Electric, etc., Co.*, (Mo. App.) 85 S. W., (2d) 200; *Rose* v. *Squires*, 101 N. J. L., 438, 128 A., 880.

Literally, scores of decisions can be quoted in such connection with various grounds given for the decision.

The joint liability a declaration sets out need not be proved. *Buddington* v. *Shearer*, 22 Pick., 427, 429. In every tort of this nature, there is an independent as well as a joint liability, and a joint tortfeasor, or what in a legal sense is the same thing, one standing in the same relation as a joint tortfeasor, cannot complain that, as to his co-defendant, there has been nonsuit, discontinuance or favorable verdict. *Rose* v. *Squires*, supra; *Hurley* v. *New York, etc., Co.*, 43 N. Y. S., 259; *Wallace* v. *Third Avenue R. Co.*, 55 N.

Y. S., 132; 1 Chitty, *86; Huddy, Automobile Law, 7–8, p. 372; *Lindman* v. *Kansas City*, 308 Mo., 161, 271 S. W., 516; *Matthews* v. *Delaware L. & W. R. Co.*, 56 N. J. L., 34, 27 A., 919; *Lovelace* v. *Miller*, 150 Ala., 422, 43 So., 734; *Goekel* v. *Erie R. Co.*, 100 N. J. L., 279, 126 A., 446; 11 Encyc. Plead. & Prac., 852; 15 Encyc. Plead. & Prac., 583; 18 C. J., 1177; *McCamley* v. *Electric Co.*, supra; *Hefferon* v. *Reeves*, 140 Minn., 505, 167 N. W., 423; *Stith* v. *Newberry Co.*, 336 Mo., 467, 79 S. W. (2d), 447; *Chr. Heurich Brewing Co.* v. *McGavin*, 16 Fed. (2d), 334; *Rhodes* v. *Southern Ry. Co.*, 139 S. C., 139, 137 S. E., 434; *Upham* v. *Mickleson* (Iowa) 157 N. W., 264; *Wilson* v. *Morris*, 108 Neb., 255, 187 N. W., 805; *Edwards* v. *Great Northern Ry. Co.*, 42 N. D., 154, 171 N. W., 873; *Southern Hardware, etc., Co.*, v. *Block Bros.*, 163 Ala., 81, 50 So., 1036; *Halsey* v. *Minnesota-South Carolina, etc., Co.*, 174 S. C., 97, 177 S. E., 29, 100 A. L. R., 1; *Munroe* v. *Carlisle*, 176 Mass., 199, 57 N. E., 332; *Oulighan, Admr.* v. *Butler*, 189 Mass., 287, 75 N. E., 726.

Logically, runs a note in the *Harvard Law Review*, (Vol. 18, page 229,) once having made his choice, an injured party cannot turn a joint into a several action, citing *Wiest* v. *Electric, etc., Co.*, 200 Pa. St., 148, 49 A., 891, which so holds. Modern practice generally, however, considers the action both joint and several. Torts are in their nature several. 1 Chitty, *supra*; *Hayden* v. *Nott*, 9 Conn., 367, 371. The opinion in *Matthews* v. *Delaware L. & W. R. Co.*, supra, clearly presents the majority view as to the law on the question.

A motion for a nonsuit is tantamount to a demurrer to evidence. *Sykes* v. *Maine Central Railroad Company*, 111 Me., 182, 88 A., 478. In ordering a nonsuit for insufficiency of plaintiff's evidence, the court simply declares the law applicable thereto. It says the facts proven fail to cast liability on defendant, but the court does not, nor could, attempt to determine the actual facts of the case, nor is judgment of nonsuit bar to a subsequent action for the same cause. *Pendergrass* v. *York Mfg. Co.*, 76 Me., 509.

The common-law rule applicable in actions of assumpsit, that if one defendant is not proved liable, the verdict must be in favor of all the defendants, does not apply in tort actions. *Bakula* v. *Schwab*, supra; *Gillerson* v. *Small*, 45 Me., 17. Where the action

is on a joint contract, the statutes in this jurisdiction provide for individual judgments if the defendants are not found jointly liable. R. S., Chap. 96, Sec. 105; *Day* v. *Scribner*, 127 Me., 187, 142 A., 727.

The *Davis* v. *Caswell* case, 50 Me., 294, referred to in the brief of counsel for defendant Harper, is not opposed to this view. The Davis case holds that an action for joint trespass, meaning a trespass committed by the connected action of two or more persons, or by the action of one or more of them with the authority or assent of the others, cannot be sustained by evidence that, for his own purpose or convenience, one person went upon the premises of another without invitation, express or implied. That case is the converse of this one.

In the exception, there is no legal merit.

It is denied, under the new trial motion, that evidence sufficiently sustains a verdict for plaintiff. The ground that the verdict be set aside because of excessiveness in the award of damages, has not been argued, and is considered as abandoned.

There was, on June 29, 1937, and is yet, a public highway, the course whereof, through the business part of Canaan village, is generally east and west; the way is designated Main Street. Over the full width of the traveled portion of the street is a coating of tar; on each side of the tar, for several feet, is a graveled surface.

On the south side of the road, and on the west side of Carrabassett Stream, was a building occupied by plaintiff for his filling station and garage. Almost opposite, on the north side, was the Wentworth store, this building also accommodating the post office.

Defendant Estes' taxi, which he had driven from some eastward point, had been brought to a stop, off the roadway, in front of the post office. Presently, its owner and driver started the machine, his intention being to make a U-turn, and drive back upon the road in the easterly direction.

The taxi was upon the tarred surface, and within and headed across the lane for traffic westward bound, (the evidence as to how far, and whether the machine was still in motion, is in conflict,) when it and an automobile proceeding on its own side of the street, in a westerly direction, collided. Defendant Harper was driving this car.

The right rear end of the Harper vehicle struck the left front fender of the Estes taxi; upon that, the Harper automobile caromed into plaintiff's garage, and partially demolished it; moreover, the automobile struck plaintiff, who was in the garage attending to his own affairs; he sustained substantial bodily hurt. The jury awarded the proof to the plaintiff, and found the damages $2,711.18.

Himself guilty of no contributory negligence, plaintiff's right to recover was complete as to a defendant liable to make compensation for the loss sustained. *Bakula* v. *Schwab*, supra.

If, on a rational weighing of the contradictory evidence, the defendant Harper was guilty of a want of that care which would have been exercised by a man of ordinary care and prudence under the circumstances, he was guilty of negligence. The standard of negligence is that of reasonable care.

An abridged sketch of the testimony touching liability, detailing first that given by witnesses called by plaintiff, will afford a background from which to understand the evidentiary showing as the printed record discloses it.

Arvelle Tuttle, aged seventeen years, said, while on the witness stand, that he heard tires squeak, and, on looking from inside the Arnst garage, that he saw the (Harper) car coming down the road "kind of sidling and just about to hit the other (Estes) car." The "cars hit" and Harper's car came across the street. The Harper automobile, according to the testimony of this witness, was, on the squeaking of the tires arresting his attention, twenty-five or thirty feet from the Estes vehicle, and coming at an hourly rate of twenty-five to thirty miles. Estes' taxi was then in the road, at stop, headed straight across.

Alpheus Nason was in the taxi. He did not see the Harper car coming; does not know if the taxi had, at the time of collision, been already stopped. He says the projection of the taxi into the road was a foot or a foot and a half.

Sherman Hallowell, of the State Police, arrived after the accident. The taxi was into the tarred highway some forty-five inches. Estes, so the officer bears witness, said that if his car was moving, about which he (Estes) was uncertain, its speed was three or four miles the hour. The Harper car tracks, as witness observed them, were at almost right angles to the road.

Virginia Whidden was on the rear seat of the taxi. She said, in testifying, that through the side window, she glimpsed the automobile, (Harper's) rolling very fast; that, at the time of the collision, the taxi was standing still.

Plaintiff himself, while on the stand, did not testify on the score of liability.

Nonsuit was, as noticed above, imposed at the close of the plaintiff's evidence, and the resting of his case.

Defendant Harper testified that as he approached at a twenty-five mile rate, the taxi very suddenly turned out toward the road; that he applied his brakes and bore to the left; "by that time I was hit." Witness said that he did not have time to swerve and avoid collision. The Estes taxi was three or four feet onto the road, and moving, when the cars hit, he stated.

Della Harper, wife of defendant, was riding in his automobile. Her testimony is that their car was practically abreast of the taxi, — closer than ten feet, — when the latter started onto the road. In the rest of her testimony, she corroborated, in essential details, the statements of her husband.

Elden Salisbury, nineteen years old, called by defendant, said while witnessing, that from his nearby position on the street, which he was about to cross, and hence was giving his attention to vehicular positions, he saw the (Harper) car, its speed twenty-five or thirty miles, and its distance thirty or thirty-five feet, when Estes' taxi turned into the highway, and proceeded about four feet. Witness was not certain that the Estes vehicle stopped. The accident happened "all in a flash"; the Harper car struck the Estes car, turned slightly, and went completely across the road out of control.

In rebuttal, William Tuttle, who gave his age sixty-four years, testified that he was sitting in the farthest front corner of the Wentworth store, near a window, listening to a radio, when, glancing out, he noticed the (Harper) car traveling down the road at, as he estimated, forty miles the hour. Estes' taxi, on the authority of this witness, was about one foot on the black road.

And, finally, Charles L. Estes, in favor of whom as defendant, the plaintiff had been nonsuited, gives testimony that, on turning into the road, and then looking for the very first time in its direc-

tion, he saw what proved to be the Harper automobile. It was one hundred feet away, oncoming; thereupon, he brought his taxi to a stop; one wheel was "on the black."

A verdict clearly against the weight of the evidence should be set aside, and a new trial granted.

The weight of evidence depends on its effect in inducing belief. The question is not on which side are the witnesses more numerous, but what, in convincing power, is outweighing.

The established rule is — it is the province of the jury to weigh conflicting testimony; and the court will be slow in disturbing a verdict unless there is sufficient to make it appear that the verdict was clearly against the weight of evidence. *Pollard* v. *Grand Trunk Railway Co.*, 62 Me., 93.

In the case just cited, a verdict rested on no more secure foundation than the testimony of a deeply interested party, in opposition to that of disinterested, intelligent and unimpeached witnesses, was regarded as manifestly against the weight of evidence.

It is to be borne in mind that Charles L. Estes is a deeply interested witness. Counsel for him, as an original party defendant, are, in effort to sustain the trial court entry of nonsuit, active to the extent of arguing at the bar of this court, and of submitting a brief.

To support a verdict, there must be evidence of real worth. *Hall* v. *Cumberland County, etc., Co.*, 123 Me., 202, 122 A., 418. The evidence must be reasonable, and so consistent with the circumstances and probabilities in the case as to, on contrast with and weighing against the opposing evidence, raise a fair presumption of its truth. Overwhelmed by opposing evidence, a verdict cannot stand. *Moulton* v. *Sanford, etc., Railway Co.*, 99 Me., 508, 59 A., 1023; *Cyr* v. *Landry*, 114 Me., 188, 95 A., 883; *Harmon* v. *Cumberland County, etc., Co.*, 124 Me., 418, 130 A., 273; *Raymond* v. *Eldred*, 127 Me., 11, 140 A., 608; *Page* v. *Moulton*, 127 Me., 80, 141 A., 183; *Goudreau* v. *Ouelette*, 133 Me., 365, 178 A., 355. The decision reached by triers of fact must have a sound basis, and be arrived at by a logical process in order to be accepted as final in a last court of resort. *Emery* v. *Fisher*, 128 Me., 453, 148 A., 677. The essential common sense of that is evident. To hold otherwise would be a mockery of justice. *Pollard* v. *Railway Company*, supra.

See, too, *Dexter* v. *Canton Toll-Bridge Co.*, 79 Me., 563, 566, 12 A., 547.

That plaintiff was severely injured is unquestioned; that he in any manner contributed to his injury, no one intimates; however, a perusal of the record compels the conclusion that the verdict of the jury did not proceed from an unimpassioned and impartial consideration, in all its legal relations, of all the evidence in the case.

Exception overruled.
Motion sustained.
New trial granted.

STATE OF MAINE *vs.* REED DYER.

Androscoggin. Opinion, September 19, 1939.

CRIMINAL LAW.

Respondent, in criminal action, having been acquitted, is not, from any judicial point of view, aggrieved by ruling as to challenges of jurors.

The penalty of imprisonment for any term of years, and that of imprisonment for one's life, are of different specific significations in the law.

On exception. Respondent on the trial of court in indictment charging him with robbery was found not guilty thereof. While jury was being formed to try him respondent claimed and was allowed four peremptory challenges but was denied the fifth. Respondent filed exception to this ruling. Exception overruled. Judgment for the State. Case fully appears in the opinion.

Edward J. Beauchamp, County Attorney.

Armand A. Dufresne, Jr., Assistant County Attorney, for the State.

Neal A. Donahue, for the respondent.

SITTING: DUNN, C. J., STURGIS, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. A single indictment contained two counts, one for robbery, a crime punishable, upon conviction, by imprisonment for any term of years, the other for assault with intent to rob, the assailant being then and there armed with a dangerous weapon. For such offense, the punishment or penalty imposable on a person found guilty is imprisonment for not less than one year and not more than twenty years. See, as to the first, R. S., Chap. 129, Sec. 15; as to the second, the same chapter, Sec. 24.

In the pending case, the respondent pleaded below, in respect to each charge, that he was not guilty.

While a jury was being formed to try him, he claimed and was allowed four peremptory challenges. R. S. Chap. 146, Sec. 20; Chap. 96, Sec. 95. Then, invoking a statute, R. S., Chap. 146, Sec. 13, granting the exercise, in absolute right, while a jury is being impanelled for the trial of a defendant upon an indictment for a crime the penalty for which is imprisonment for life, of twenty challenges, he essayed a fifth challenge. This was denied.

The trial resulted, as to the robbery charge, in acquittal thereof.

The respondent's discharge from that accusation of guilt completely altered the situation under which the exception here urged was reserved.

Argument of the exception brings up a moot question only. Had the respondent been found guilty of robbery, room might have presented, on the record, for discussion, and decision, with regard to the ruling by which, allegedly, he was aggrieved. Having been acquitted, he is not now, from any judicial point of view, aggrieved by the ruling.

It may be added, however, that the penalty of imprisonment for any term of years, and that of imprisonment for one's life, are of different specific significations in the law. *State* v. *Howard*, 117 Me., 69, 102 A., 743.

Exception overruled.
Judgment for the State.

CLAIRE A. DOSTIE, ADMRX.

vs.

LEWISTON CRUSHED STONE COMPANY.

Androscoggin. Opinion, September 27, 1939.

NEGLIGENCE. MOTOR VEHICLES. DAMAGES.
R. S. 1930, CHAP. 101, SECS. 9–10, AS AMENDED.

It is negligence to use an instrumentality which the actor knows or should know to be so defective that its use involves an unreasonable risk of harm to others. If the use of the instrumentality threatens serious danger to others unless it is in good condition, there is a duty to take reasonable care to ascertain its condition by inspection.

There is a generally operative duty of inspection where the circumstances are such as would lead a reasonable man to believe that an inspection is necessary, as where the thing used is one likely to deteriorate by previous use or other causes or where the actor has some other reason for suspecting that the article may be defective.

The actor's negligence lies in his act of using the defective instrument without adequate inspection, not in his omission to perform his duty of inspection.

Generally speaking, it is the duty of one operating a motor vehicle on the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to its occupants or to other travellers.

It is common knowledge that defective tires are a frequent cause of blow-outs which have a known tendency to cause the vehicle to swerve and become unmanageable, but the mere fact that a tire blows out does not, without more, render the owner or operator of the automobile liable.

The unsafe condition of the tire must be established and that its condition was known to the owner or operator or could have been discovered by the exercise of reasonable care.

Where the blow-outs result from defects in the tire arising from age or wear, there seems little doubt that responsibility should attend the dereliction of the vehicle owner in using such equipment, if the faults would be disclosed on reasonable inspection.

The recovery in this case, brought for the benefit of a father and mother to recover damages for death of their son, must be limited to compensation to the parents for the pecuniary effect upon them of the death of their son.

Damages may not be given by way of punishment or through sentiment or from prejudice, but as a pure question of pecuniary compensation for the loss sustained which the jury governed, as a general rule, by probabilities, finds fairly inferable from the evidence.

The sum given must be the present worth of the pecuniary benefits of which the beneficiaries have been deprived by the wrongful neglect of the defendant. Neither loss of the decedent's society and companionship, nor any grief suffered by the beneficiaries has proper place in the award.

In ordinary cases, the compensatory damages which may be awarded under R. S. 1930, *Chap.* 101, *Secs.* 9 *and* 10, *as amended, are and must be based solely on probabilities. But when a beneficiary dies* pendente lite, *his death has a controlling influence on the quantum of the recovery for his benefit. His right to compensation for his pecuniary loss vests as of the time of the death of the person killed, not at the time of bringing suit or of recovery.*

By the weight of authority, the right of having an action maintained therefor is not abated by the beneficiary's death, but the damages recoverable in his behalf are limited to the pecuniary loss he suffered up to the time of his death.

On general motion for a new trial. Action brought under Sec. 9 and Sec. 10, as amended, of Chap. 101 of the R. S. of 1930, for the benefit of the father and mother of one Dostie, who was instantly killed when the automobile in which he was riding as a guest passenger, collided with a truck driven by an employee of the defendant corporation. After verdict for the plaintiff, defendant filed a general motion for a new trial. New trial as to damages only unless plaintiff will remit all of damages awarded in excess of $1250.00 within thirty days after filing of rescript. Case fully appears in the opinion.

Berman & Berman (Lewiston, Maine), for plaintiff.

William B. Mahoney,

Frank T. Powers, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. This is an action brought under Section 9, and Section 10 as amended, of Chapter 101 of the Revised Statutes, for the

benefit of the father and mother of Dominique E. Dostie, who was instantly killed on August 23, 1938, when the automobile in which he was riding as a guest passenger, collided with a truck driven by an employee of the defendant corporation, the Lewiston Crushed Stone Company. After verdict for the plaintiff, the defendant filed a general motion for a new trial.

The collision occurred on the main highway leading from Auburn to Mechanic Falls. As the cars came toward each other, both travelling about thirty miles an hour, and were about one hundred feet apart and each on its own side of the road, the left front tire of the defendant's truck blew out causing it to swerve to the left and across the highway directly in the path of the automobile in which the plaintiff's decedent was riding. The collision which followed badly damaged the cars and so injured the decedent that he died almost immediately and without conscious suffering. It is stipulated on the record that the truck which was in the collision was owned by the defendant corporation and its servant or agent, who was operating it, was acting within the scope of his employment.

The plaintiff's right of recovery is based primarily on the claim that the defendant corporation was negligent in driving its truck, or allowing its employee to drive it, equipped with a defective tire. There is no convincing proof that, after the blow-out, the driver of the truck failed to properly operate the vehicle. Nor can the defendant's contention that the decedent was guilty of contributory negligence be sustained. The case presented is narrowed to the single issue of whether the tire which blew out was defective and the defendant corporation can be charged with actual or constructive knowledge of its condition and held liable for the results which followed.

It is negligence to use an instrumentality which the actor knows or should know to be so defective that its use involves an unreasonable risk of harm to others. If the use of the instrumentality threatens serious danger to others unless it is in good condition, there is a duty to take reasonable care to ascertain its condition by inspection. There is a "generally operative duty of inspection where the circumstances are such as would lead a reasonable man to believe that an inspection is necessary, as where the thing used is

one likely to deteriorate by previous use or other causes or where the actor has some other reason for suspecting that the article may be defective." Restatement, Torts, Sec. 307. In Section 300 of that text, it is pointed out that "the actor's negligence lies in his act of using the defective instrument without adequate inspection, not in his omission to perform his duty of inspection."

In Huddy, Automobile Law, Vol. 3–4, p. 127 *et seq.*, the foregoing rule, as applied to motor vehicles, has been laid down in this language:

> "Generally speaking, it is the duty of one operating a motor vehicle on the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to its occupants or to other travelers.
>
> "To this end, the owner or operator of a motor vehicle must exercise reasonable care in the inspection of the machine, and is chargeable with notice of everything that such inspection would disclose."

It is common knowledge that defective tires are a frequent cause of blow-outs which have a known tendency to cause the vehicle to swerve and become unmanageable, involving great risk of harm to others. They may be and often are caused by accidents for which no responsibility exists and the mere fact that a tire blows out does not, without more, render the owner or operator of the automobile liable. The unsafe condition of the tire must be established and that its condition was known to the owner or operator or could have been discovered by the exercise of reasonable care. *Glazer* v. *Grob*, 136 Me., 123, 3 A., (2d), 895. And it is held that "where they (the blow-outs) result from defects in the tire arising from age or wear, there seems little doubt that responsibility should attend the dereliction of the vehicle owner in using such equipment, if the faults would be disclosed on reasonable inspection." *Delair* v. *McAdoo*, 324 Penna., 392, 395, 188 A., 181.

There is no dispute as to the history of the tire that blew out in the instant case. The plaintiff introduced evidence which warranted the finding that it was a second-grade and second-hand six-ply bus tire, manufactured in 1934 and used on a truck for some months by

another owner before the defendant's manager bought it. How old it was or the extent of its prior use was not made known by the seller nor did anyone on the defendant corporation's behalf attempt to ascertain these facts. The tire and others of the same kind and in the same condition, on December 22, 1936, were placed on the four wheels of the defendant's one and one-half ton Ford dump truck which was used generally in hauling and delivering fill, gravel and crushed rock both locally and to distant construction jobs. The road over which the truck travelled to and from the defendant's crushed rock plant located in the outskirts of Lewiston, was unimproved and filled with rocks and gravel. The yard of the plant in the vicinity of the crusher was covered with crushed stone and broken rock. Deliveries were made to road and bridge construction jobs in and out of which the truck undoubtedly travelled a rough and rocky road. The loads it hauled were heavy and it may be inferred that it was driven fast on the return trips.

Late in December, 1937, or early in January, 1938, after about a year's use on the truck, the treads on the front wheels were found to be worn down almost to the fabric and the tires were retreaded and reinstalled. They saw enough service through the rest of the winter and following spring and summer to again wear the tread on the right front tire down to the fabric and the rubber on the one on the left front wheel to a thickness of about one-eight of an inch. This was the condition of these tires when, on August 9, 1938, the manager of the defendant corporation, becoming, as he says, "*skeptical*" about their condition, looked at them, had three replaced, and testing the tread of the tire on the left front wheel by sticking the point of a jackknife into it and seeing one-eighth of an inch of rubber, passed it as fit for further service and allowed it to remain on the wheel. He did not remove the tire and examine the inside of it or otherwise test its condition. The blow-out came in the edge of the tread and was due to a break in the fabric. An experienced tire man, whose qualifications were not questioned, examining the tire after the collision, advanced the opinion that the strength of the fabric of the tire in general was practically gone due to age, hard usage and road heat, and that this condition was discoverable by removal of the tire from the wheel.

The jury committed no manifest error in finding that the tire

which blew out was defective and in an unsafe condition which could have been discovered by the exercise of reasonable care. Their apparent rejection of the knife test of the rubber on the tread as a compliance with the owner's duty to make a reasonable inspection of the tire, especially in the light of its known age and the use to which it had been subjected, was justified. On the issue of liability, the defendant is not entitled to a new trial.

The parents of the decedent, for whose benefit this action was brought, were advanced in years. His mother, Aurelie Dostie, was 74 years old when he was killed and she died on November 11, 1938, less than three months thereafter. His father, Eugene Dostie, was 79 years old and, so far as appears, enjoyed the usual good health of a man of his age. The decedent was 47 years old, unmarried, in good health and of good habits. In 1935–1936, for eighteen months he was employed in a dry cleansing plant earning $25.00 to $35.00 a week. During the next year, he worked for his sister in a market receiving $30.00 to $35.00 a week, but in August, 1937, this business proved unsuccessful and was sold. He had no employment thereafter until April, 1938, when for about a month and a half he trained for an inspector in a local mill but was let go for lack of color sensitiveness. He earned $164.50 at this mill but had no other income prior to his death. He had no trade or special training for any particular kind of work. Before his death, he had used up a small savings account which he had accumulated and had cashed his insurance annuities. Although he made his home with his sister and father and mother and had helped to defray the expenses of the household, he had been relieved of that responsibility by his sister on his agreement to resume payments when financially able. He had an estate of nominal value only when he died.

When the decedent was in funds he was not the sole support of his parents. The sister, Claire A. Dostie, who brings this action as administratrix of his estate, conducted a prosperous insurance agency and appears to have been the real head and mainstay of the family. She at all times contributed to or alone paid the expenses of the household, which included the support and maintenance of the parents. Conceding her assertion that the decedent, when working, paid in $15.00 to $20.00 a week toward the household expense to be true, the proportionate cost of his own sustenance must be taken

from this and his direct contribution to his parents' welfare computed accordingly. It must be repeated, however, that before he died, the decedent's money had given out, he was out of work and had no definite prospects of finding remunerative employment which would enable him to make further substantial contributions to those dependent upon him.

The recovery in this case must be limited to compensation to the parents for the pecuniary effect upon them of the death of their son. Damages may not be given by way of punishment or through sentiment or from prejudice, but as "a pure question of pecuniary compensation" for the loss sustained which the jury governed, as a general rule, by probabilities finds fairly inferable from the evidence. The sum given must be the present worth of the pecuniary benefits of which the beneficiaries have been deprived by the wrongful neglect of the defendant. Neither loss of the decedent's society and companionship, nor any grief suffered by the beneficiaries has proper place in the award. *Carrier* v. *Bornstein*, 136 Me., 1 A. (2d), 219; *Williams* v. *Hoyt*, 117 Me., 61, 102 A., 703; *Oakes* v. *Maine Central Railroad Co.*, 95 Me., 103, 49 A., 418; *McKay* v. *New England Dredging Co.*, 92 Me., 454, 43 A., 29.

In ordinary cases, the compensatory damages which may be awarded under the statute are and must be based solely on probabilities. But when a beneficiary dies *pendente lite*, his death has a controlling influence on the quantum of the recovery for his benefit. His right to compensation for his pecuniary loss vests as of the time of the death of the person killed, not at the time of bringing suit or of recovery. *Williams* v. *Hoyt*, supra; *Hammond* v. *Street Railway*, 106 Me., 209, 76 A., 672. And by the weight of authority, the right of having an action maintained therefor is not abated by the beneficiary's death, but the damages recoverable in his behalf are limited to the pecuniary loss he suffered up to the time of his death. *Sider* v. *General Electric Co.*, 238 N. Y., 64, 143 N. E., 792; *Pitkin* v. *New York Central & Hudson R. Co.*, 87 N. Y. S., 906; *Cooper* v. *Shore Electric Co.*, 63 N. J. L., 558, 44 A., 633; *City of Shawnee* v. *Cheek*, 41 Okla., 227, 256, 137 P., 724; Sutherland on Damages, Vol. 5 (4th Ed.), Sec. 1260; 16 Am. Juris. 156. We are of opinion that this rule of damages should be applied to the pecuniary loss which can be here recovered for the benefit of the

decedent's mother. In so far as *Williams* v. *Hoyt*, 117 Me., 61, 102 A., 703, *supra*, may be interpreted as in conflict with this rule, it must be and is overruled.

The decedent's situation as to finances and employment at and prior to his death have all been reviewed. They furnish ground only for a reasonable inference that his contribution to his parents for the few months his mother lived, and for the 5.09 years of expectancy allotted to his father would be small in amount and irregular in payment. It is inconceivable that this man could have supported himself and paid in for his parents' benefit more than $700.00 each and every year either or both of them lived. That is the average annual payment reflected by the award of $3600.00 which the jury made. It is clearly excessive. On the evidence, we are of opinion that $1250.00 represents the present worth of the contribution which it can be reasonably estimated this decedent would have made for his parents' benefit. A larger award was not warranted.

On the question of liability, the verdict must stand. A new trial on damages will be granted unless the plaintiff files a remittitur in accordance with this opinion. The mandate must be

New trial as to damages only unless plaintiff will remit all of damages awarded in excess of $1250.00 *within thirty days after filing of rescript.*

ROBERT R. JORDAN *vs.* LEILA C. GAINES.

Cumberland. Opinion, October 7, 1939.

CONSTITUTIONAL LAW. ANIMALS.

When exceptions clearly show that the only question brought up is the constitutionality of statutes, the Law Court is precluded from considering and determining other matters argued.

The phrases "due process of law" and "the law of the land" are identical in meaning.

Notice and opportunity for hearing are of the essence of due process of law.

The taking of property without notice and opportunity for hearing violates both the Fourteenth Amendment and Section 6 of Article 1 of the Constitution of Maine, unless the taking constitutes a valid exercise of police power.

The due process clause does not prevent proper exercise of the police power of the state.

"Police power" is the power which the states have not surrendered to the nation, and which by the Tenth Amendment were expressly reserved to the states respectively or to the people.

Private property is held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order or welfare.

One may use his private property in a way so detrimental to the rights of the public with relation to public health, morals, safety, order or welfare as to permit legislative deprivation of such property without compensation. In cases of extreme and urgent necessity, as in conflagrations or epidemics, such property may be destroyed under authority of the police power without notice or hearing.

Whether a particular statute has validity as a proper exercise of the police power depends on whether or not it extends only to such measures as are reasonable, but then the police regulation must be reasonable under all circumstances.

The test used to determine the constitutionality of the means employed by the legislature, in exercising police power, is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes any restrictions on such rights.

The validity of a police regulation primarily depends on whether under all the existing circumstances the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power.

Where animals are destroyed under humanitarian statutes providing for the destruction of abandoned or disabled animals, notice and hearing are necessary.

It is only in cases of urgent necessity in the interests of society's right of self-defense that private property may be taken and destroyed or sold without notice and opportunity of a hearing.

On exceptions. Trover to recover damages for the alleged conversion of six cows. Defendant, a State Humane agent, pleaded the general issue and by way of brief statement justified taking the chattels by virtue of the Revised Statutes and acts amendatory thereto. Involved are Sections 63 and 67 of Chapter 135, Revised Statutes, 1930, the latter as amended by Chapter 114 of the Pub-

lic Laws of 1931. The presiding Justice adjudged them constitutional and on motion directed verdict for defendant. Plaintiff filed exceptions to direction of verdict. Exceptions sustained. Case fully appears in the opinion.

Nunzi F. Napolitano, for plaintiff.

Richard S. Chapman, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. Trover to recover damages for the alleged conversion of six cows. The defendant, a State Humane agent and an agent of the Pine Tree Humane Society, pleaded the general issue and, by way of brief statement, that "she was justified in taking the chattels . . . by virtue of the Revised Statutes of the State of Maine and acts amendatory thereto."

Involved are Sections 63 and 67 of Chapter 135, R. S. 1930, the latter as amended by Chapter 114 of the Public Laws of 1931. The presiding Justice adjudged them constitutional and on motion directed a verdict for the defendant, to which ruling the exceptions now before us were taken.

The exceptions clearly show that the only question brought up is the constitutionality of these statutes and preclude our consideration and determination of other matters argued both by the plaintiff's and the defendant's counsel. "We cannot travel out of the bill of exceptions. . . ." *State* v. *Intox. Liquors*, 102 Me., 385, 390, 67 A., 312; *McKown* v. *Powers*, 86 Me., 291, 29 A., 1079; *Verona* v. *Bridges*, 98 Me., 491, 57 A., 797; *Lenfest* v. *Robbins*, 101 Me., 176, 63 A., 729; *Mencher* v. *Waterman*, 125 Me., 178, 132 A., 132; *Frost, Adm'r* v. *C. W. Cone Taxi & Livery Company*, 126 Me., 409, 139 A., 227; *Hamilton* v. *Wilcox et al.*, 126 Me., 529, 140 A., 201.

Section 67 as amended reads as follows:

> "Any person may take charge of an animal whose owner has cruelly abandoned it, or cruelly fails to take care of and provide for it, and may furnish the same with proper shelter, nourishment, and care at the owner's expense, and have a lien

thereon for the same; and may enforce said lien in the manner provided for in section sixty-three of this chapter. . . ."

Section 63 reads:

"Persons or corporations having such lien, may sell such animals at public auction, in the town or city where they were found or are detained, after three days' written notice to the party claiming or owning the same; or if such party cannot be found, by publishing notice of the time and place of sale for three successive days in any daily, or once in any weekly newspaper printed in the county where such animals were found or are detained, and from the proceeds of such sale, may deduct all costs, charges, and expenses, and a reasonable compensation for trouble, and shall hold the balance, if any, for, and pay over the same, on demand, to the parties owning said animals, or to the legal representatives of such parties."

The plaintiff contends that these statutes contravene the Fourteenth Amendment of the Federal Constitution and Article I, Section 6 of the State of Maine Constitution. The Fourteenth Amendment in part provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ," while Section 6 of Article I of our State Constitution protects the accused against deprivation "of his life, liberty, property or privileges, but by judgment of his peers, or by the law of the land."

The phrases "due process of law" and "the law of the land" are identical in meaning. *Randall* v. *Patch*, 118 Me., 303, 305, 108 A., 97; *Bennett* v. *Davis*, 90 Me., 102, 105, 37 A., 864; *Eames* v. *Savage*, 77 Me., 212, 220; *State of Maine* v. *Doherty*, 60 Me., 504, 509; *State* v. *Knight*, 43 Me., 11, 122. They are of equivalent import and interchangeable. *Re: John M. Stanley*, 133 Me., 91, 95, 174 A., 93.

The question then is whether or not these sections of the statute when complied with effect deprivation of one's property without due process of law.

While other grounds of unconstitutionality are relied upon by the plaintiff, only one needs consideration, viz: failure of provision for notice of the taking and opportunity for hearing. "Notice and

opportunity for hearing are of the essence of due process of law." *Randall* v. *Patch*, supra, 118 Me., on page 305, 108 A., on page 98; *Re: John M. Stanley*, supra, 133 Me., on page 95, 174 A., 93; *York Harbor Village Corporation* v. *Fred H. Libby et al.*, 126 Me., 537, 539, 140 A., 382. The taking of property without notice and opportunity for hearing violates both the Fourteenth Amendment and Section 6 of Article I of the Constitution of Maine, unless the taking constitutes a valid exercise of the police power.

The due process clause does not prevent *proper* exercise of the police power of the state. *Boston & Maine R. R. Co.* v. *County Commissioners*, 79 Me., 386, 10 A., 113; *State* v. *Rogers*, 95 Me., 94, 49 A., 564; *State* v. *Robb*, 100 Me., 180, 60 A., 874; *State* v. *Frederickson*, 101 Me., 37, 63 A., 535; *Opinions of Justices*, 103 Me., 506, 69 A., 627; *State* v. *Mayo*, 106 Me., 62, 75 A., 295; *State* v. *Phillips*, 107 Me., 249, 78 A., 283; *State of Maine* v. *King*, 135 Me., 5, 188 A., 775.

Speaking of the police power, this Court said in *York Harbor Village Corporation* v. *Libby et al.*, supra, 126 Me., on page 540, 140 A., on page 385:

> "It is not the offspring of constitutions. It is older than any written constitution. It is the power which the states have not surrendered to the nation, and which by the Tenth Amendment were expressly reserved 'to the states respectively or to the people.'
>
> Limitations expressed or necessarily implied in the Federal Constitution are the frontiers which the Police Power cannot pass. Within those frontiers its authority is recognized and respected by the constitution and given effect by all courts."

Also, as stated in the last cited case, "private property is held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order or welfare." One may use his private property in a way so detrimental to the rights of the public with relation to "public health, morals, safety, order or welfare" as to permit legislative deprivation of such property without compensation. In cases of extreme and urgent necessity, as in conflagrations or epidemics,

such property may be destroyed under authority of the police power without notice or hearing. *Randall* v. *Patch*, supra.

> "If the use is actually and substantially an injury or impairment of the public interest in any of its aspects above enumerated a regulating or restraining statute or ordinance conforming thereto, if itself reasonable and not merely arbitrary, and not violative of any constitutional limitation, is valid. It is not a deprivation of property which the constitution forbids, but an enforcement of a condition subject to which property is held." *Village Corporation* v. *Libby et al.*, supra, pages 540 and 541.

Whether a particular statute has validity as a proper exercise of the police power depends on whether or not it "extends only to such measures as are reasonable," but then the police regulation "must be reasonable under all circumstances. Too much significance cannot be given to the word 'reasonable' in considering the scope of the police power in a constitutional sense, for the test used to determine the constitutionality of the means employed by the legislature is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes any restrictions on such rights. . . . The validity of a police regulation therefore primarily depends on whether under all the existing circumstances the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power." 11 Am. Jur., Section 302, pages 1073, 1074, and 1075.

In *Loesch* v. *Koehler*, 41 N. E., 326 (Indiana), cited with approval in *Randall* v. *Patch*, supra, it was held that a statute authorizing certain officers to kill any animal neglected or abandoned and which, in the opinion of three reputable citizens, is injured or diseased past recovery or by which is has become useless, is invalid so far as it authorizes the killing, without any notice to the owner of the examination as to its condition. Also see *King* v. *Hayes*, 80 Me., 206, 13 A., 882.

In 12 Am. Jur., Section 683, on page 364, the *Loesch* case and *Randall* v. *Patch*, supra, are cited as authority for the statement that "Where animals are destroyed under humanitarian statutes

providing for the destruction of abandoned or disabled animals, notice and hearing are necessary." Then this is added: "The same rule applies to a lien created on the animals," citing *Jenks* v. *Stump*, 93 Pac., 17 (Colorado). In the *Jenks* case, the statute provided that:

> "Any officer or agent of the State Humane Society may lawfully take charge of any animal found abandoned, neglected or cruelly treated, and shall thereupon give notice thereof to the owner, if known, and may care and provide for such animal until the owner shall take charge of the same, and the expense of such care and provision shall be a charge against the owner of such animal, and collectible from such owner by said Humane Society in an action therefor."

In the following section it was provided that:

> "When said Humane Society shall provide neglected and abandoned animals with proper food, shelter and care, it may detain such animals until the expense of such food, shelter and care is paid, and shall have a lien upon such animals therefor."

It will be noted that the Colorado statute did provide for notice of the taking to the owner, while our statutes simply provide for notice before the sale at public auction. The difference in the time of giving the notice is of concern to the owner. Where it is given immediately after the taking, he may then proceed to regain his property before expenses of maintenance are incurred which may exceed the value of the animals taken.

With reference to the claimed validity of the Colorado statute under the police power, the Court said:

> "The distinction in all such cases seems to be whether public necessity demands summary action, and, when it does not, notice must be given to the owner of the property and an opportunity be given, before some competent tribunal, to determine the truth of the allegations in each case, before the same is taken and before any lien is created upon it, and before it can be sold."

In 12 Am. Jur., Section 683, *supra*, it is stated:

"The necessity of notice and hearing depends upon the purpose for which animals are destroyed. Where the destruction is based upon the presence of a contagious or infectious disease and is for the purposes of preventing the spread of the disease and for protecting health, the destruction without a prior hearing has been sustained as not violating the due process guaranty."

"But the grant of power to an officer of a humane society to take charge of any abandoned or mistreated animals, to provide them with food, and to detain them until the expenses are paid, without restricting the authority of the officer to cases of emergency or public necessity, and without providing any notice to the owner or an opportunity for hearing, has been held to be unconstitutional as permitting a deprivation of property without due notice." 2 Am. Jur., Section 165, page 815.

"No statute can confer such authority that does not give the owner a right to be heard in a judicial or other similar proceeding and that does not make provision for just compensation for the value thereof." 3 C. J. S., Section 83, page 1198.

It is urged by counsel for the defendant that the statutes we are considering do not provide for the destruction of the property. That is true, but it does permit the taking of one's property without notice and opportunity of hearing and the later sale of the property at public auction. By such sale the owner is as much deprived of his property as though it were destroyed, and we cannot see why, if notice and an opportunity for hearing are required in case of destruction, where there is no urgent necessity for summary action, it is not as much required in case of the sale of such property. Deprivation to the owner is as much effected in the one instance as in the other.

We feel that the rule as indicated in *Randall* v. *Patch*, supra, is and should be that it is only in cases of urgent necessity in the interest of society's right of self-defense that private property may be taken and destroyed or sold without notice and opportunity of a hearing. As this Court in the *Randall* case, *supra*, held that the

statute then under consideration (which did not provide for notice or hearing) was unconstitutional because it contravened an explicit constitutional mandate, so now we arrive at the same conclusion as to the validity of said Sections 63 and 67, and pronounce them unconstitutional.

Exceptions sustained.

STATE OF MAINE *vs.* COLIN R. DUNN.

Lincoln. Opinion, October 7, 1939.

CRIMINAL PLEADINGS. CRIMINAL LAW.

Formal defects in indictments remain proper subjects of general demurrer, as at common law.

If an indictment contains both good and bad counts, a general demurrer must be held insufficient.

Generally, an indictment for statutory offense must allege all the elements necessary to constitute the offense either in the words of the statute or in language which is its substantial equivalent.

Generally, an indictment for statutory offense committed by officer of election is required to cover only, with time and place, all the material statutory terms and need not be expanded beyond them.

It is never requisite that the indictment should disclose the evidence by which it is to be supported and a negative averment is not usually required to be so full as an affirmative one.

Where the words of a statute may by their generality embrace cases falling within its literal terms, which are not within its meaning or spirit, the indictment must be enlarged beyond the words of its enactment, and allege all facts necessary to bring the case within legislative intent.

Where the intent with which an act made criminal is done forms no part of the offense, it is not necessary to prove any intent in order to justify a conviction.

As to unlawful acts which naturally affect the result of an election, a criminal intent will be presumed.

On report. Respondent indicted for violations of election statutes. On filing of demurrer, by respondent, case was reported with stipulation if indictment be held good the case to stand for trial; otherwise indictment to be quashed. Case sent back to Superior Court, where it will be required that there be answer to the merits of the indictment. It is so ordered. Case fully appears in the opinion.

James Blenn Perkins, Jr., County Attorney for the State.

Pattangall, Goodspeed & Williamson, for respondent.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

DUNN, C. J. To this indictment, which has sixty-seven counts, twenty-five drawn under the single section of Public Laws of 1935, Chapter 134, with forty-two allegedly for violations of provisions of Section 10 of Chapter 9 of the 1930 revision of the statutes, the respondent filed a demurrer. Whether it is general or special is not of mention, nor is the demurrer itself in the printed record.

On filing of the demurrer, the case was, the parties assenting, reported to this Court, a stipulation stating that, if the indictment be held good and sufficient, as upon demurrer, the case shall stand for trial; otherwise the indictment shall be quashed.

1935 Laws, Chapter 134, of mention above, refers to, and thereby makes a part of itself, not Section 10 of Chapter 9, also of notice hereinbefore, in entirety, but the final, or penalty prescribing feature thereof, and no other of its words or phrases. The text of such adapted part does not employ the adverb "wilfully." This is our answer to contention otherwise.

The first, or twenty-five count group in the indictment, alleges the commission, as to five voters, of as many separate but affiliated criminal offenses, by the officer presiding at a town voting place in a state election. These, as laid, concern not affording opportunity for the challenging of individual voters, challenges of such voters, permitting each of them to vote without prior compliance with statute requirements, and failure to make notations, and as well returns, of challenges.

In the second group, as to the votes of each of fourteen voters

voting in absence, are charges against the same election official, of three allegedly different crimes.

The demurrant's argument goes wholly to the indictment. The question of the legal sufficiency of that accusatory document as a pleading was the seemingly sole object of a general demurrer, and alone the ground of prayer for judgment.

Formal defects in indictments remain proper subjects of general demurrer, as at common law. *State* v. *Mahoney*, 115 Me., 251, 98 A., 750. On the other hand, if an indictment contain both good and bad counts, a general demurrer must be held insufficient. *State* v. *Miles*, 89 Me., 142, 36 A., 70.

The offenses the indictment lays are purely statutory ones, by the officer of election. In general, the indictment for such an offense, the statute describing it in whole, is simply required to cover only, with time and place, all the material statutory terms, and need not be expanded beyond them. *Commonwealth* v. *Connelly*, 163 Mass., 539, 40 N. E., 862; *State* v. *Lockbaum*, 38 Conn., 400; *State* v. *Bailey*, 21 Me., 62.

The leading rule for all indictments on statutes is to embody in allegation all the elements necessary to constitute the offense, either in the words of the statute, or in language which is its substantial equivalent. *Tulley* v. *Commonwealth*, 4 Met., Mass., 357; *Commonwealth* v. *Welsh*, 7 Gray, 324; *State* v. *Hussey*, 60 Me., 410; *State* v. *Bushey*, 96 Me., 151, 51 A., 872; *State* v. *Conant*, 124 Me., 198, 126 A., 838. It is never requisite that the indictment should disclose the evidence by which it is to be supported. *Commonwealth* v. *Harris*, 13 Allen, Mass., 534. And a negative averment is not usually required to be so full as an affirmative one. Bishop, Crim. Pro., 1, Section 641.

The counts in the indictment — or some one of them at least, as, for instance, the sixty-seventh, or that of latest appearance in the record, against which, in difference from the others, the respondent's brief makes no specific attack — measure to controlling standard.

The gist of the offense charged in the sixty-seventh count is that the election official "did then and there feloniously fail to note the fact that Richard L. Fowle, then and there a qualified elector of said Westport, had then and there challenged the absent voting

ballot of James Murray, when as (*sic*) the same was then and there cast at said election, together with the name of the said James Murray, upon the said absent voting ballot of the said James Murray, so challenged, as aforesaid, witnessed by two election officers representing two different parties against the peace of said State and contrary to the form of the statute in such case made and provided."

The draftsman of this count evidently had the statute before him. R. S., *supra.*

Assuredly, as argued, where the words of a statute may by their generality embrace cases falling within its literal terms, which are not within its meaning or spirit, the indictment must be enlarged beyond the words of its enactment, and allege all facts necessary to bring the case within legislative intent. *State* v. *Lashus*, 79 Me., 541, 11 A., 604; *State* v. *Doran*, 99 Me., 329, 59 A., 440; *State* v. *Conant*, supra.

Such exception to the general rule does not, however, apply to the case at bar.

Where, save in instances of no present importance, the intent with which an act made criminal is done forms no part of the offense, it is not necessary to prove any intent in order to justify a conviction. *State* v. *Rogers*, 95 Me., 94, 49 A., 564; *State* v. *Chadwick*, 119 Me., 45, 109 A., 372; *State* v. *Morton*, 125 Me., 9, 130 A., 352. As to unlawful acts which naturally affect the result of an election, a criminal intent will be presumed. *State* v. *Connelly*, supra.

Inquiry now is not what might, at issue to the merits in the court below, avail defensively, but the legal sufficiency of the indictment as a criminal pleading, tested, not necessarily by its counts collectively, but by any one of them; for, as has been seen, any count in itself good — and such there is — will withstand a general demurrer.

Upon the issue of law raised by the demurrant's dilatory plea, judgment goes against him. The case is being sent back to the Superior Court, where it will be required that there be answer to the merits of the indictment.

It is so ordered.

STATE OF MAINE *vs.* LEWIS L. ELA.

Somerset. Opinion, October 9, 1939.

MANSLAUGHTER. MOTOR VEHICLES.

Gross or culpable negligence in criminal law involves a reckless disregard for the lives or safety of others. It is negligence of a higher degree than that required to establish liability upon a mere civil issue.

On appeal from denial of general and special motion for a new trial. Respondent convicted by jury of manslaughter. Respondent filed general and special motion for new trial before presiding Justice. Motions denied. Respondent appeals. Appeal from denial of general motion for new trial sustained. Case fully appears in the opinion.

George M. Davis, County Attorney for the State.

Edward S. Anthoine,

W. Folsom Merrill, for respondent.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. At *nisi prius*, the respondent, Lewis L. Ela, was tried and found guilty of manslaughter. The case comes before the Law Court for review on his appeals from the denial of a general and a special motion for a new trial.

Just before eight o'clock, daylight saving time, of the morning of September 11, 1938, as the respondent drove the heavy passenger bus, which he was operating, through a ground fog on the state highway between Burnham and Pittsfield, the bus collided with a Ford sedan apparently driven by Joseph Pullman, the deceased. The sedan rebounded, was pushed back off the road and turned over, while the bus continued on, crashed into an automobile which was following the decedent's car and came to a stop. Joseph Pullman was instantly killed.

The bus which the respondent was driving was eight feet wide, about thirty-one feet long and weighed approximately seven tons. It was a passenger bus but on this morning was en route from Boston to Bangor loaded only with newspapers for delivery at various distributing points along the way. The driver and a helper were the only occupants. The bus was apparently in good mechanical condition, its brakes were working properly, and when the collision occurred its headlights were on.

It was Sunday morning, the weather was fair, and although the sun was shining brightly, in places there were fog banks, some light affecting visibility little if any, and others heavy and dense. The fog where the cars came together seems to be accurately described by the driver of an automobile which went through it just ahead of the bus, in these words: "As you went into this fog you could see it; you could see that you were coming into fog, but, as you went into it, your visibility or your ability to see ahead was not impaired very much, but, as you went into it, it got thicker suddenly. It was just like going into a darkened room. There was a core in the center of the fog that was — the visibility was — why, you just simply couldn't see." This man further states that the fog was so thick in the core that he could not see the car which was immediately in front of him or even a reflection of his headlights on its rear bumper, and the cars which were in collision could not be seen until they were passing him. This description of the fog is fully confirmed throughout the record.

This man is also the only adult person other than the respondent and his helper who is able to furnish any information as to the operation of the bus and the car in which the decedent was killed just prior to the accident. He states that driving along towards Pittsfield and preceded by two other automobiles going in the same direction, from about the time he left Burnham he noticed that the bus was following close behind his car and at all times near enough to be seen in his rear view mirror. As he entered the fog, he slowed his car down to a speed of about thirty-five miles an hour and in his mirror saw that the bus was then on its right-hand side of the road and reducing its speed. He did not again look back but, entering the core of the fog bank and driving on the right-hand side of the road about six inches off the center line, suddenly met two automobiles coming from the opposite direction, which passed by on the opposite lane of the road clearing

his car by not more than three feet, and both were travelling at high speed. As the second car went by, there was a crash back down the road and in a fraction of a second this automobile also collided with the bus. Driving his car ahead into a yard by the road, this man quickly returned to the scene of the accident and assisted in stopping oncoming traffic.

The State contends that just prior to its collision with the car in which the decedent died the respondent turned the bus he was operating to the left and across the center line of the highway to pass the car ahead which it was following, and drove it directly into the path of the automobiles coming from the opposite direction. Both of these cars, the attorney for the State insists in argument, after passing the car ahead of the bus continued on down the westerly lane and two and one-half feet from the center line of the highway. As the brief reads, this "is precisely where the State contends they [these automobiles] were" when they collided with the bus.

The State first called to the stand a ten- or eleven-year-old girl who was riding on the back seat of the car which went into the fog just ahead of the bus and was driven by her father, whose description of the fog bank and other incidents of the collision have been related. This child said that as she rode along, occasionally she looked back through the rear window and watched the bus following on behind. Just before the collisions, being then turned towards the front of the car, she saw two automobiles coming, turned around to see the bus, noticed it was turning out to the left to go around the car in which she was riding, and turned back to speak to her father when she heard a crash. The child can not, however, tell how far back the bus was when, as she says, she saw it turning to the left, nor how long before the collision this turn was made. Her testimony must be read in the light of the fact that whatever happened just prior to this accident took place in a dense fog where visibility was practically blotted out or reduced to a minimum. If this child's assertion that she saw the approaching cars, turned and saw the bus swinging to the left, and turned back to speak to her father is analyzed, it is apparent that it should be given little weight. In the dense fog as described, there is much doubt whether the bus could have been seen or the course of its travel determined with any degree of accuracy. Although the honest intention of this young girl to speak the truth can

not be questioned, unfortunately the undisputed facts bar an acceptance of her testimony as reasonably correct and credible.

The State introduced numerous photographs with measurements and statements of observers of marks on the surface of the highway indicating that the collisions occurred on the west or left lane of the highway looking towards Pittsfield. It was shown that marks of various kinds, the easterly one three feet and eight and one-quarter inches west of the center line of the road ran back seventy-two feet in more or less of an arc out over the shoulder and to the Ford sedan in which the decedent was killed. Although it would seem probable that this car was in the west lane when it was hit and that these marks, or part of them at least, were made by its tires and broken underbody as it was hurled back up and off the road, the marks furnish no convincing proof that the sedan was several feet from the center line of the road at the time of the collision or what its course was prior thereto. It may be assumed that the impact when the car and bus came together was terrific and the rebound of the light automobile substantial. We can not believe that the Ford sedan was not diverted from its position in the highway when the collision came or was driven backwards along the same course it had followed in its approach.

The State also showed through the same photographs and observers that there were tire marks leading back northerly approximately eighty-five feet from or near the point of collision, all the way on or just easterly of the center line of the road. For a part of this distance, these marks formed a single, in places broken, track of wide black smootches made, it would appear, by one of the front tires of the bus. Then for a few feet a double track was found which, it must be inferred, was caused by one set of the dual tires with which the rear wheels of the bus were equipped. Back of that was a single tire track forty-five feet long. This entire broken but otherwise continuous line of tracks, the State claims, was made by the wheels on the right side of the bus and demonstrates that when these collisions took place the whole of the bus was on the wrong side of the road.

This Court is not of the opinion that the contention of the State as to tire marks made by the bus can be reconciled with other evidence in the record. The bus was struck only on its extreme left front and side. The end of its front spring there was damaged and the mud-

guard beside it bent down and the headlight just above turned back against the hood. The left front tire was blown out and the front axle on that side pushed back, forcing the wheel against the body where it was wedged in by the fender brace. Although the left side of the shell of the radiator was slightly bent, neither its core nor the number plates hanging down directly in front of it were damaged, nor can marks of the collision be seen elsewhere on the body or chassis. And the same seems to be true of the automobiles which collided with the bus. Apparently, each was struck on its left front end. None of the vehicles show the damage which would have necessarily resulted if the right wheels of the bus were on the center line of the concrete with it full width of eight feet out into the west lane. The more reasonable inference to be drawn from this evidence is, we think, that it was the wheels on the left side of the bus which were on or just off the center line of the concrete with only a small part of the body projecting into the west lane when the collision with the Ford sedan occurred. This conclusion avoids the mathematical and physical improbabilities of the State's contention.

The respondent, taking the stand in his own defense, denies that he made any attempt to turn out and pass the car which was immediately ahead of him, but says that following along back of it a distance of about forty feet, with diminished speed and all lights burning he entered and drove through the fog in the easterly lane of the highway and just to the right of the center line, following that line by the guidepost on his left front fender. He states that he saw the car in which the deceased was killed just as it passed the rear end of the car ahead, and his account of the collision is that the oncoming car came directly towards the bus, crashed into its left front fender, was driven up into the air and then pushed back up the road until it veered out to the left-hand side of the way and into the ditch. He continues by saying that his left front tire was blown out by this collision and the front axle of the bus on the left-hand side was pushed back against the body where it was wedged in by the fender brace. He adds with insistence that the air brakes with which the bus was equipped ceased to operate at the same time, and with the bus in this condition he was able to hold it in a straight course for only a short distance when it veered to the left over into the west lane and collided with the second automobile. This car he did not see until it was with-

in ten feet of the bus. Further extended review of the respondent's testimony is unnecessary and comment thereon can well be brief. Regardless of when the left front tire of the bus blew out and the air brakes were broken, with all doubts resolved in the respondent's favor, the evidence shows clearly that he was not driving to the right of the center line of the highway when the decedent's car was hit, but with the left wheels of the bus on that center line. The tires on those wheels were wider than their treads and the mudguards and body extended still farther out. The bus was, to some extent, over on the wrong side of the road.

This Court is not of the opinion that in this case the State has proved that the respondent, Lewis L. Ela, was guilty of the gross or culpable negligence which it is necessary to establish to sustain his conviction for manslaughter. Gross or culpable negligence in criminal law involves a reckless disregard for the lives or safety of others. It is negligence of a higher degree than that required to establish liability upon a mere civil issue. *State* v. *Wright*, 128 Me., 404, 148 A., 141; *People* v. *Sikes*, 328 Ill., 64, 159 N. E., 293; *Aiken* v. *Street Railway*, 184 Mass., 271, 68 N. E., 238; *People* v. *Campbell*, 237 Mich., 424, 212 N. W., 97; *State* v. *Lester*, 127 Minn., 282, 149 N. W., 297.

As already pointed out, the facts proven in this case and inferences reasonably to be drawn therefrom strongly indicate that the respondent was driving the bus he was operating practically on the right side of the road when the accident occurred in which the decedent was killed. He failed, however, to keep it entirely off the other lane in which the decedent had the right of way. He was driving through a blinding fog under conditions that undoubtedly made it extremely difficult for him to determine his exact position in the road. It may well be that by the exercise of greater care and caution he could have kept the whole of the bus on its own side of the road. That he failed in this regard does not, however, we think, show a reckless disregard of the safety of other travellers on the way. It can be properly viewed as inattention and inadvertence only, for which a civil action for negligence might lie. That we can not and do not here decide.

The State has relied on circumstantial evidence to establish the guilt of the accused. The facts proven and the inferences reasonably

to be drawn therefrom do not point irresistibly to that fact. A belief that he was not criminally negligent is not excluded beyond a reasonable doubt. The presumption that he is innocent remains unbroken.

It is unnecessary to pass upon the special motion for a new trial on the ground of newly-discovered evidence. The appeal from the denial of the general motion must be sustained and a new trial granted.

Appeal from denial of general motion for new trial sustained.

WATERVILLE REALTY CORPORATION *vs.* CITY OF EASTPORT.

Kennebec. Opinion, October 31, 1939.

CONSTITUTIONAL LAW. EXCEPTIONS. EVIDENCE.

When presiding Justice ruled that a defendant was entitled to a continuance as a matter of right, the ruling was exceptionable as against contention that exception should not be heard because presiding Justice exercised judicial discretion in granting continuance.

When bill of exceptions shows what the issue is and how the excepting party is aggrieved, without so stating that the exceptant is aggrieved, the bill is sufficient.

Where the privilege to present exceptions after the end of the term is not reserved with consent of the parties during the term, they can not be allowed thereafter.

Where nothing in the bill of exceptions shows that privilege to present exceptions after the end of the term is reserved with consent of the parties during the term, the fact that the exceptions were allowed raises a strong presumption that they were properly allowed by the presiding Justice.

When case is heard without the intervention of a jury, exceptions to rulings in matters of law do not lie unless there has been an express reservation of the right to except, but exceptions would be heard where it does not appear that there was no such express reservation.

Under provisions of Federal Constitution declaring that no state shall pass any

law "impairing the obligation of contracts" a state to a certain extent and within proper bounds may regulate remedy for enforcement of contract, but if by subsequent enactment it so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests. The constitutional prohibition secures from attack not merely the contract itself, but all the essential incidents which render it valuable and enable its owner to enforce it.

The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right.

That part of Section 3 *of Chaper* 233, *P. L.* 1937, *which forbids the commencement and maintenance and compels suspension and continuance of actions brought to enforce payments of debts and satisfaction of obligations of municipalities taken over under the act, impairs the obligation of contracts.*

The Law Court is bound by interpretations of Federal Constitution by United States Supreme Court.

There may be a valid impairment of obligations of contracts during a public emergency by proper exercise of the police power of the state.

Legislation enacted under the police power in a time of emergency must not only be addressed to a legitimate end, but the measures taken must be reasonable and appropriate thereto.

In determining whether statute preventing the enforcement of claims against a city was justified as emergency legislation, fact that the statute was not enacted "in case of emergency" in denial of right of referendum, while not conclusive on question of "public emergency," was of some significance.

The entitling of the act as one "creating a Board of Emergency Municipal Finance," without expression of facts in a preamble constituting a public emergency, does not compel a conclusion that there was a public emergency rather than one solely private affecting, for instance, only certain municipalities.

Judicial notice of the fact is not taken that more than a very few cities and towns in Maine were so badly involved financially when statute was enacted that there was "an urgent public need" for the enactment of such legislation.

The Law Court would not take judicial notice of fact that an alleged public emergency necessitating legislation creating Board of Emergency Municipal Finance had not ceased when action was brought to declare such legislation unconstitutional.

Public emergency legislation continues to be valid only as long as such an emergency continues.

On exceptions. Action in assumpsit on a negotiable twenty-year coupon bond issued by the City of Eastport on January 1, 1915. Defendant on claiming continuance as matter of right under statute creating Board of Emergency Municipal Finance was granted continuance by presiding Justice, and to such ruling the plaintiff took exceptions. Exceptions sustained. Case fully appears in the opinion.

Harvey D. Eaton, for plaintiff.

Franz U. Burkett, Attorney General of Maine,

Ralph W. Farris, Assistant Attorney General of Maine, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. Assumpsit on a negotiable twenty-year coupon bond issued by the City of Eastport on January 1, 1915. Plea, general issue with brief statement "that the plaintiff is barred from proceeding with this action on the ground that a Board of Emergency Municipal Finance was created under Chap. 284 of P. L. of 1933 and amended by Chap. 233 of P. L. 1937, providing that no suit shall be brought against the City of Eastport until the commission has relinquished its authority, and the said City of Eastport was taken over by said Board on Dec. 23, 1937." Having so pleaded, the "defendant claimed a continuance as matter of right." The justice below, hearing the case without intervention of jury, stated and ruled:

> "The sole issue presented to the Court was the validity of the Statutes set forth in the defendant's brief statement.
>
> "If the Statutes are invalid, the plaintiff is entitled to judgment upon his claim. If the Statutes are valid, the defendant is entitled to a continuance as a matter of right. I rule that the defendant is entitled to a continuance as a matter of right.
>
> "The same is to stand continued."

To this ruling the plaintiff excepted.

The defendant presents several reasons why the exceptions should not be heard. First it says that the justice exercised judicial dis-

cretion in granting the continuance and that in the absence of abuse of discretion his ruling is not exceptionable. As to this contention, it need only be said that the justice, rather than exercising discretion, ruled that the defendant was entitled to the continuance *as a matter of right.*

Again it objects that the exceptions fail to set forth that the plaintiff was aggrieved by the ruling, but "The bill shows what the issue is and how the excepting party is aggrieved. It satisfies the requirements laid down by this Court in *Jones* v. *Jones et al.*, 101 Me., 447." *State* v. *Mooers*, 129 Me., 364, 369, 152 A., 265, 268. When the ruling is such that the exceptions show, without so stating, that the exceptant is aggrieved, it is sufficient.

It also asserts that where the privilege to present exceptions after the end of the term is not reserved with consent of the parties during the term, they can not be allowed thereafter. Undoubtedly this is law in this state. But nothing in these exceptions shows that this privilege was not reserved. The fact that they were allowed raises a strong presumption that they were properly allowed by the presiding Justice.

Again it insists that the case having been heard without the intervention of a jury, exceptions to rulings in matters of law do not lie unless there has been an express reservation of the right to except, and it is so held in *Frank* v. *Mallett*, 92 Me., 77, 79, 42 A., 238. But again it does not appear that there was no such express reservation.

> ". . . in the absence of anything in the bill to show the contrary, the certificate of the presiding Justice that the exceptions are 'allowed' is conclusive as to their being rightfully allowed in this respect." *State* v. *Intox. Liquors*, 102 Me., 385, 390.

Involved in this case is the constitutionality of a portion of Section 7 of Chapter 284 of the Public Laws of 1933 as amended by Section 3 of Chapter 233 of the Public Laws of 1937, reading as follows:

> "During the time said commissioner or commissioners are in charge of the administration of any city, town or plantation, no suit shall be brought or maintained against such commis-

sioner or commissioners nor against the said municipality, and the enforcement of all claims, liens, debts, judgments, attachments or other actions then pending or subsisting against said municipality shall be suspended and continued until said commissioner or commissioners shall have completed their duties and relinquished their authority over such municipality, except that they may authorize the payment of any such claims in their discretion prior to such relinquishment. During the period of the control by said commissioner or commissioners, the statute of limitations shall not run on any obligations of the city, town or plantation."

As to duration of power of the board, Section 8 of Chapter 284, as amended by Section 4 of Chapter 233, P. L. 1937, reads:

"Said board shall continue in charge of the government and financial affairs of said city, town or plantation until such time as its taxes due the state, or loans made therefor, expenses or obligations incurred by said commissioner or commissioners, or the board of emergency municipal finance shall have been paid and until in the opinion of the commissioner or commissioners, or the emergency municipal finance board, the financial affairs of said city, town or plantation may be resumed under local control."

The claim of unconstitutionality is the asserted violation of Article I, Section X of the Federal Constitution declaring that no state shall pass any law "impairing the Obligation of Contracts."

Is there an impairment? In *Phinney* v. *Phinney*, 81 Me., 450, 17 A., 405, 407, while recognizing "that a state to a certain extent and within proper bounds may regulate the remedy," the court holds that "if by subsequent enactment it so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests. The constitutional prohibition secures from attack not merely the contract itself, but all the essential incidents which render it valuable and enable its owner to enforce it." Cited in the Phinney case is *Louisiana* v. *New Orleans*, 102 U. S., 206, with this quotation:

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, — by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of those means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

Our Court then said, 81 Me., on page 462; 17 A., on page 407:

"The result arrived at in all the decisions, bearing upon this question, seems to be that the legislature may alter or vary existing remedies, provided that in so doing, their nature and extent is not so changed as materially to impair the rights and interests of parties to existing contracts."

In *Richmond Mortgage & Loan Corporation, Appellant* v. *Wachovia Bank & Trust Company et al.*, 300 U. S., 124, 57 S. Ct., 338, 81 Law Ed., 552, decided February 1, 1937, the Supreme Court stated the applicable principle pertaining to impairment of a contract by modification, limitation, or alteration of the remedy as follows:

"The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right."

This principle is confirmed in the recent case of *Honeyman, Appellant* v. *Jacobs et al.*, decided April 17, 1939, and reported in Vol. 83, No. 13, Law Ed., Adv. Ops., on page 660.

In *Peabody* v. *Stetson*, 88 Me., 273, 34 A., 74, 77, this Court approvingly quoted this from *Edwards* v. *Kearzey*, 96 U. S., 607:

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom

> they rest. The ideas of right and remedy are inseparable. Want of right and want of remedy are the same thing. . . . The laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement."

We hold that that part of Section 3 of Chapter 233, P. L. 1937, which forbids the commencement and maintenance and compels suspension and continuance of actions brought to enforce payments of debts and satisfaction of obligations of municipalities taken over under this act, impairs the obligation of contracts.

But it seems, by recent decisions of the U. S. Supreme Court (by which this Court, agreeing or not, is bound), that there may be a valid impairment of obligations of contracts during a public emergency by proper exercise of the police power of the state. Perhaps the leading Supreme Court decision so holding is *Home Building & Loan Asso.* v. *Blaisdell*, 290 U. S., 398, 54 S. Ct., 231, 78 Law Ed., 413, in which the Chief Justice said, 78 Law Ed., on pages 429 and 430:

> "It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. . . . And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes."

In that case the court sustained the validity of the Minnesota mortgage moratorium statute as against the claim it violated said Section X of Article I of the Federal Constitution. The majority of the court held that the legislation was temporary in operation and limited to the exigency which called it forth. It is to be noted that that decision is based squarely on the existence of a public emerg-

ency warranting the exercise of the police power of the state. The Chief Justice in his opinion quoted this language from *Manigault* v. *Springs*, 199 U. S., 473, 50 Law Ed., 274, 26 S. Ct., 127:

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

Legislation enacted under the police power in a time of such an emergency must not only be addressed to a legitimate end, but the measures taken must be reasonable and appropriate thereto. *Des Moines Joint Stock Land Bank* v. *Nordholm*, 253 N. W., 701, 705 (Iowa); *Home Building & Loan Asso.* v. *Blaisdell*, supra; *Nebbia* v. *People of the State of New York*, 78 Law Ed., 940, 291 U. S., 502, 54 S. Ct., 505.

In *Honeyman* v. *Hanan*, 9 N. E. (2d), 970, 275 N. Y., 382, the New York Court of Appeals said on page 975:

> "We hold only that reasonable limitations and restrictions may be placed upon actions to recover the debt, in order to meet conditions which constitute an imminent danger to the public welfare."

The limitations on the doctrine announced in the *Blaisdell* case, *supra*, are set forth in an opinion by Chief Justice Hughes in the later case of *W. B. Worthen Co.* v. *Thomas*, 292 U. S., 426, 54 S. Ct., 816, 818, 78 Law Ed., 1344, in which he stated:

> "We held in *Home Bldg. & L. Asso.* v. *Blaisdell*, supra . . . , that the constitutional prohibition against the impairment of the obligation of contracts did not make it impossible for the State, in the exercise of its essential reserved power, to protect

> the vital interests of its people. . . . We held that when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. This is but the application of the familiar principle that the relief afforded must have reasonable relation to the legitimate end to which the State is entitled to direct its legislation."

In *Citizens Mut. Bldg. Ass'n* v. *Edwards*, 189 S. E., 453 (Virginia), it was held that the statute then under consideration, which gave to the corporation commission the power to suspend or limit the payment of indebtedness by any building association for such period as the commission might determine and which deprived the courts of jurisdiction to entertain a suit or action against such association during such period, so far as it applied to a contract made before the passage of said law, violated said Section X of Article I of the United States Constitution. The court pointed out that "The Virginia act is unlimited in duration and is not confined to the period of any public emergency." Speaking of the Minnesota moratorium statute, the court said on page 457, it "was predicated upon a public emergency which was declared by the Legislature to be in existence as a result of the severe financial and economic depression then sweeping over the country," and then differentiated the Virginia statute by declaring that it had no such foundation and said: "It simply provides for a moratorium at the hands of the State Corporation Commission for 'any association facing an emergency due to withdrawal of funds or otherwise.' Such broad language includes not only an emergency affecting the public as a whole, but also an emergency confined solely to the affairs of the particular association, even though such may be brought about by the mismanagement or misconduct of its officers or employees. The power of suspension may be invoked in normal as well as in abnormal times; in periods of prosperity and in times of distress."

In *First Trust Joint Stock Land Bank of Chicago* v. *Arp*, 283 N. W., 441 (Iowa), the court says on page 443:

> "Emergency in order to justify the intervention of the reserve police power must be temporary or it cannot be said to be

an emergency. If a so-called emergency exists beyond a temporary period then it is no longer an emergency but a status and can furnish no basis or authority for legislative action in contravention of or inconsistent with the provisions of the State and Federal constitutions."

In 11 Am. Jur., Section 252, it is stated:

"The rule is well settled that if emergency statutes are promotive of the public welfare, they are a valid exercise of the police power. The contention is often made that emergency police measures in the nature of moratoria violate that clause of the Federal Constitution forbidding any state to pass laws impairing the obligation of contracts. The general principle arising from the decisions is that such police measures may be valid although temporarily impairing the power to enforce contracts. . . . It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by urgent public need produced by economic causes. Thus, the police power may be exercised without violating the true intent of the provision forbidding impairment of the obligation of contracts, in directly preventing by a temporary and conditional restraint the immediate and literal enforcement of a contractual obligation, where vital public interests would otherwise suffer.

"In the enactment of emergency police measures, the question as to whether an emergency exists is primarily for the legislature to determine. Such determination, although entitled to great respect is not conclusive because the courts, in such cases, possess the final authority to determine whether an emergency in fact exists."

Then will application of the principles of law declared in the above citations permit a holding that this statute is constitutional as a proper exercise of the police power? We do not think so. It is not clear that such a *public* emergency existed as would warrant its exercise. The fact that this statute was not enacted "in case of emergency" in denial of the right of referendum (Constitution of

Maine, Amendment XXXI), while not conclusive on the question of public emergency, is of some significance. The entitling of the act as one "Creating a Board of Emergency Municipal Finance," without expression of facts in a preamble constituting a public emergency, does not compel a conclusion that there was a public emergency rather than one solely private affecting, for instance, only certain municipalities. We do not take judicial notice of the fact that more than a very few cities and towns in this state were so badly involved financially when this statute was enacted that there was "an urgent public need" for the enactment of such legislation.

But assuming a public emergency then to have existed, there is nothing in this record to show, nor do we take judicial notice of the fact, that such an emergency had not ceased when this action was brought. Did we validate this act as public emergency legislation, it could have efficacy only as long as such an emergency continued. *Home Building & Loan Asso.* v. *Blaisdell*, supra.

This statute was not enacted to have effect only during a period of public emergency. It was to be effective not only until the municipality's state taxes should be paid, together with the expenses and obligations of the Board of Emergency Municipal Finance, but thereafter it would still be operative "until in the opinion of the commissioner or commissioners, or the emergency municipal finance board, the financial affairs of said city, town or plantation" might "be resumed under local control."

Thus, this statute (as it was held in *Citizens Mut. Bldg. Ass'n* v. *Edwards*, supra, the Virginia statute did) would permit the Emergency Municipal Finance Board to exercise its powers "in normal as well as in abnormal times; in periods of prosperity and in times of distress." Although it has been held by the Supreme Court that a state in time of public emergency may by proper exercise of its police power constitutionally impair the obligation of contracts, yet this statute can not be held to be constitutional for the reason that it fails to impose the "reasonable limitations and restrictions" necessary to constitute a *proper* exercise of the state police power.

The mandate must be,

Exceptions sustained.

STATE OF MAINE *vs.* VICTOR LANGELIER.

Androscoggin. Opinion, November 3, 1939.

SODOMY. CRIMINAL PLEADINGS.

By weight of recent authority, sodomy as used in connection with statutes prohibiting the crime against nature is interpreted in its broad sense and held to include all acts of unnatural carnal copulation with mankind or beast.

It has frequently been held that it is sufficient merely to charge the accused with the commission of the crime of "sodomy," or of "the crime against nature," the crime being too well known and too disgusting to require other definition or further details or description.

By reason of the vile and degrading nature of the crime of sodomy, it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required.

In the offense of sodomy assault is an element only when the offense is perpetrated upon an unwilling human being, and is not an element if the other party consents, or when the offense is committed with a beast.

Consent is no defense to a prosecution for sodomy, thus distinguishing the prosecution from one of rape.

Forms used in criminal procedure in Maine have generally included the allegation of force in an indictment charging sodomy, yet it being unnecessary of proof, an indictment which covers all the material statutory terms is sufficient.

On exceptions. On indictment charging respondent with crime of sodomy, respondent demurred specially on the ground that indictment did not allege an assault upon the person with whom the offense was committed. Exceptions overruled. Indictment adjudged sufficient. Case fully appears in the opinion.

Edward J. Beauchamp, County Attorney,

Armand A. Dufresne, Jr., Assistant County Attorney (on the brief) for State.

Frank T. Powers, for respondent.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. Indictment for sodomy. Defendant demurred specially on the ground that the indictment did not allege an assault upon the person with whom the offense was committed. Another ground for demurrer was alleged but not pressed, the defense conceding that it was without merit.

The late case of *State* v. *Cyr*, 135 Me., 513, 198 A., 743, points out that,

> "By the weight of recent authority apparently supported by better reasoning, sodomy as used in connection with statutes prohibiting the crime against nature is interpreted in its broad sense and held to include all acts of unnatural carnal copulation with mankind or beast."

It has frequently been held that it is sufficient merely to charge the accused with the commission of the crime of "sodomy," or of "the crime against nature," the crime being too well known and too disgusting to require other definition or further details or description. Wharton's Crim. Pro. 10th ed., V. 2, Secs. 1234 and 1243; 8 R. C. L. 335.

Reason and authority lead to agreement with the opinion of the court in *Glover* v. *State of Indiana*, 101 N. E., 629, 45 L. R. A. N. S., 473:

> "By reason of the vile and degrading nature of this crime, it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required."

As the offense includes all unnatural copulations with mankind or beast, and may be committed without compulsion or force, it is plain that assault is an element only when the offense is perpetrated upon an unwilling human being, and is not an element if the other party consents, or when the offense is committed with a beast. Consent is no defense to a prosecution for sodomy, thus distinguishing the prosecution from one for rape. 58 C. J., pp. 789, 792.

Although forms used in criminal procedure in this state have generally included the allegation of force in an indictment of this character, yet it being unnecessary of proof, an indictment which covers all the material statutory terms is sufficient. *State* v. *Bushey*, 96 Me., 151, 51 A., 872; *State* v. *Conant*, 124 Me., 198, 126 A., 838.

Exceptions overruled.
Indictment adjudged sufficient.

ZIGMOND RELL *vs.* STATE OF MAINE.

Penobscot. Opinion, November 17, 1939.

ASSAULT AND BATTERY. CRIMINAL PLEADINGS.

At common law, there were no degrees of the offenses of assault or assault and battery, and the term aggravated assault had no technical and definite meaning. The punishment varied according to the discretion of the court, but the grade of the offense was the same.

Strictly, an aggravation of an offense is some act or intent not required to constitute it, but made by law a ground for a higher or increased punishment.

The general statutes of Maine prohibiting criminal assaults and batteries and providing punishment therefor, have followed the common law. R. S. 1930, *Chap.* 129, *Sec.* 27.

Under the general statute, an indictment which charged an assault or assault and battery in general terms without specifying the means by which it was accomplished has been deemed sufficient regardless of the enormity of the offense.

Whether an assault and battery shall be punished as of a high and aggravated character, depends upon the proof and not the intensity of the allegations.

The degree of the offense in any particular case of assault and battery must depend upon the proof adduced and not upon the facts alleged. The proof may constitute it a felony or only a petty misdemeanor, and upon the proof would depend the measure of the punishment.

When the law commits to the court a discretion as to the punishment, matter in mitigation or aggravation, to influence such discretion, need not be averred.

The only change made in the general statute by the Amendment of P. L. 1933, *Chap.* 92, *Sec.* 6, *is that now the maximum punishment which can be imposed for simple assault and battery has been reduced in severity, and the maximum penalty formerly provided for all such offenses is made to apply only to those of a high and aggravated nature. The imposition of sentence, within the statutory limits, is committed to the discretion of the trial judge.*

P. L. 1933, *Chap.* 92, *Sec.* 6, *does not divide assault and battery into separate and distinct crimes, and the rules laid down for charging the offense under the general statute are neither abrogated nor changed by its amendment.*

Assault and battery, regardless of its enormity, may be charged in general terms without specifying the means by which it was accomplished, and appropriate punishment imposed.

One convicted of offense may attack sentence imposed in the Trial Court by writ of error.

On writ of error. Respondent was tried and found guilty on an indictment charging assault and battery. After verdict respondent was sentenced to imprisonment in the state prison for term of not less than two and not more than four years and was committed. Respondent brings writ of error on ground that indictment did not allege assault and battery of high and aggravated nature and therefore sentence to state prison should not have been imposed. Plea denied and the judgment of the Trial Court affirmed. So ordered. Case fully appears in the opinion.

Arthur L. Thayer, for plaintiff.

John T. Quinn, County Attorney, for State.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. Writ of error reported from the Superior Court for final determination. The indictment, with copies of docket entries and commitment papers, are made a part of the report.

In the Trial Court, Zigmond Rell, alias Zigmont Rell, as respondent, was tried and found guilty on an indictment charging that "on one George A. Perkins (he), feloniously did make an assault, and him, the said George A. Perkins, then and there feloniously did strike, beat, bruise, wound, and ill treat," etc. After verdict, he was sentenced to imprisonment in the state prison for the term of not less than two and not more than four years, was committed, and it may be assumed is now serving his sentence.

The statute providing for the prosecution and punishment of persons guilty of assault and assault and battery, in force when this offense was committed, is Revised Statutes 1930, Chap. 129, Sec. 27, as amended by Public Laws 1933, Chap. 92, Sec. 6, which reads:

> "Whoever unlawfully attempts to strike, hit, touch, or do any violence to another however small, in a wanton, wilful, angry, or insulting manner, having an intention and existing ability to do some violence to such person, is guilty of an assault; and if such attempt is carried into effect, he is guilty of an assault and battery, and any person convicted of either offense when it is not of a high and aggravated nature, shall be punished by a fine of not more than $100 or by imprisonment for not more than 6 months or by both such fine and imprisonment; and when the offense is of a high and aggravated nature, the person convicted of either offense shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 5 years, when no other punishment is prescribed."

The gist of the error assigned in the writ is that the sentence imposed was not authorized by law inasmuch as the indictment does not allege that the assault and battery was of a high and aggravated nature.

At common law, there were no degrees of the offenses of assault or assault and battery, and the term aggravated assault had no technical and definite meaning. The punishment varied according to the discretion of the court, but the grade of the offense was the same. II Wharton's Criminal Law (11th Ed.), Sec. 838; 6 C. J. S., 915. As

to aggravated assaults and batteries, Mr. Bishop, in his work on Criminal Law, Ninth Edition, Vol. 2, page 32, says: "Strictly, an aggravation of an offence is some act or intent not required to constitute it, but made by law a ground for a higher or increased punishment. Thereupon the offence thus aggravated is often, yet not always or necessarily, called by another name. Still, from early times, when misdemeanors were punished by whatever fine or imprisonment the judge might deem it right to impose, it has been the judicial habit to look upon assaults as more or less aggravated by such attendant facts as appealed to the discretion for a heavy penalty. So that in practical language we speak of assault as aggravated in the latter circumstances the same as in the former." See *Cornelison* v. *Com.*, 84 Ky., 583, 600, 2 S. W., 235.

The general statutes of this state prohibiting criminal assaults and batteries and providing punishment therefor, as they appear in the Public Laws and Revisions of Statutes for now more than half a century, have followed the common law, defined the crimes without recognition of or distinction as to their grades, and while a limit was put upon the amount of the fine or the term of imprisonment which could be imposed, sentence was otherwise left entirely to the discretion of the court. The law as written into R. S. 1930, Chap. 129, Sec. 27, embodies the essential provisions of all prior applicable statutes and reads:

> "Whoever unlawfully attempts to strike, hit, touch, or do any violence to another however small, in a wanton, wilful, angry, or insulting manner, having an intention and existing ability to do some violence to such person, is guilty of an assault; and if such attempt is carried into effect, he is guilty of an assault and battery, and for either offense, he shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than five years, when no other punishment is prescribed."

As repeatedly held by this Court, the general statute was merely declaratory of the common law. *State* v. *Creighton*, 98 Me., 424, 57 A., 592; *State* v. *Mahoney*, 122 Me., 483, 120 A., 543.

Under the general statute, an indictment which charged an assault or assault and battery in general terms without specifying the

means by which it was accomplished has been deemed sufficient regardless of the enormity of the offense. In *State* v. *Jones*, 73 Me., 280, it was said: "We cannot know of what grade the offense is by the allegations. There is no necessity of alleging particular enormities. It is 'assault and battery' that is thus punishable. Whether an assault and battery shall be punished as of a high and aggravated character, depends upon the proof and not the intensity of the allegations." In *State* v. *Cram*, 84 Me., 271, 24 A., 853, not overruled on this point, we read: "Whilst by our statute an assault may be punished by five years' imprisonment, or by one day's confinement in jail, or by the merest nominal fine, still, the offense is now usually charged in the same terms whatever the punishment may be. And so it has been decided that the degree of the offense in any particular case must depend upon the proof adduced and not upon the facts alleged. The proof may constitute it a felony or only a petty misdemeanor.... Upon the proof would depend the measure of the punishment." And in *State* v. *Mahoney*, supra, an indictment charging a felonious assault, without any allegations as to the nature of the acts or attempted acts or the manner in which they were committed, was held sufficient. See *State* v. *Bean*, 36 N. H., 122, 126.

These decisions of this Court are in accord with the rule laid down in Bishop's New Criminal Procedure, Vol. I, Sec. 85, that "When the law commits to the court a discretion as to the punishment, matter in mitigation or aggravation, to influence such discretion, need not be averred. The judge, having the right to impose a specified penalty or a less or different one, at will, does no wrong to the defendant by administering the law's mercy on evidence tendered without allegation; or, on the other hand, by listening to aggravating facts to induce him to temper the mercy with justice. He simply can impose neither a greater nor other punishment than the law has provided for the crime as charged. This is an entirely different thing from punishing one for that of which he is not accused."

The only change made in the general statute by the amendment of P. L. 1933, Chap. 92, Sec. 6, is that now the maximum punishment which can be imposed for simple assault and battery has been reduced in severity, and the maximum penalty formerly provided for all such offenses is made to apply only to those of a high and aggravated nature. The definition of the crime is the same. There is

no demand for any particular measure of punishment for either offense, the imposition of sentence, within the statutory limits, being committed to the discretion of the trial judge. As we construe the new law, we are not of opinion that the legislature intended to divide assault and battery into separate and distinct crimes. It is still assault and battery which is punishable, and facts which establish that the offense is or is not of a high and aggravated nature go only to the measure of punishment and need not be alleged. The rules laid down for charging the offense under the general statute are neither abrogated nor changed by its amendment. The authorities already cited are controlling precedents for holding that assault and battery, regardless of its enormity, may be charged in general terms without specifying the means by which it was accomplished, and appropriate punishment imposed. *State* v. *Jones*, supra; *State* v. *Cram*, supra; Bishop's New Criminal Procedure, *supra*.

We find nothing in *State* v. *Neddo*, 92 Me., 71, 42 A., 253, or other authorities cited on the brief, in conflict with the view just stated. Although it is laid down that, if the different grades of a crime are made distinct offenses and punishment demanded accordingly, the essential elements of each offense must be alleged or the punishment provided therefor can not be imposed, that rule has no application when but a single offense is defined and punishment therefor is committed to the discretion of the court, subject only to maximum limits prescribed by the statute. 1 Bishop's Criminal Procedure, Secs. 81 and 85.

The plaintiff has attacked his sentence in the Trial Court, as is his right, by writ of error. *Smith* v. *State*, 33 Me., 48; *Galeo* v. *State*, 107 Me., 474, 480, 78 A., 867. His plea, however, must be denied and the judgment of the Trial Court affirmed.

So ordered.

H. E. RUTLAND *vs.* BOSTON & MAINE RAILROAD COMPANY.

Aroostook. Opinion, November 17, 1939.

TROVER. CARRIERS.

If potatoes were stolen or lost through the negligence of the carrier, in this jurisdiction trover will not lie.

A loss by mere nonfeasance will not sustain an action of trover.

When misdelivery is not established by competent evidence, surmise or conjecture can not be substituted for proof.

On exceptions. Action of trover to recover the value of a carload of potatoes. On motion, the Trial Court granted an involuntary nonsuit. Case is before Law Court on exceptions to that ruling and the exclusion of evidence. Exceptions overruled. Case fully appears in the opinion.

Bernard Archibald, for plaintiff.

Cook, Hutchinson, Pierce & Connell, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. Action of trover to recover the value of a carload of potatoes. On motion, the Trial Court granted an involuntary nonsuit. The case is before the Law Court on exceptions to that ruling and the exclusion of evidence.

Viewing the evidence most favorably for the plaintiff, the following material facts appear. H. E. Rutland, an Aroostook potato dealer, on or about May 9, 1936, sold and shipped a carload of four hundred sacks of potatoes to M. Carp & Son of Boston. The sale was made through the American Fruit Growers, Inc. of Washburn as selling agents, and the shipment was made from Presque Isle, Maine. The initial carrier, the Aroostook Valley Railroad Company, on the seller's request, issued a uniform straight bill of lading to him

as consignor, naming his agent, the American Fruit Growers, Inc., as consignee, with notation, "Advise M. Carp & Son," the buyer. There was also written into the bill of lading directions to "Allow Inspection" and "Deliver only on written order of American Fruit Growers Inc. without original B/L." The Boston & Maine Railroad Company, the defendant, was named as delivering carrier. Although not of controlling importance here, it may be noted that the bill of lading was retained by the consignor, and the American Fruit Growers, Inc., agent and consignee, having been notified of car number and contents, invoiced the car to and drew on the buyer, attaching an order authorizing delivery without bill of lading upon payment of draft, freight and other charges. These were forwarded to the First National Bank of Boston for collection, and against the draft the American Fruit Growers, Inc. made a substantial advance to the seller.

The car of potatoes arrived in Boston on May 12, 1936, and on the next day was moved to the potato house of M. Carp & Son adjoining a side track of the Boston & Maine Railroad Company in Charlestown, where, on request of M. Carp & Son, an appeal inspection was made by a representative of the United State Department of Agriculture and the potatoes reported to be below grade. On the next day, when a second appeal inspection was attempted, a visit to the car disclosed that about three hundred sacks of potatoes had been unloaded. Although it does not appear why, when, or by whom the potatoes were removed or to what place they were taken, it is established that upon being notified by the Boston & Maine Railroad Company that the shipment remained undelivered, the plaintiff directed the American Fruit Growers, Inc. to recondition the car and sell the potatoes through a local commission merchant, and on this resale there were three hundred and ninety-six sacks of potatoes in the car in which the original shipment was made, all previously taken out having been returned or replaced by others subject only to a normal loss or shrinkage.

The contention of the plaintiff is that potatoes of an inferior grade were substituted for those removed from the car on the side track in Charlestown, and the three hundred sacks which were unloaded were either misdelivered, or stolen, or lost through the negligence of the Boston & Maine Railroad Company, the delivering

carrier. Assuming these claims have merit, the plaintiff can not here prevail. If the potatoes were stolen or lost through the negligence of the carrier, in this jurisdiction trover will not lie. A loss by mere nonfeasance will not sustain this form of action. *Dearbourn* v. *Union National Bank*, 58 Me., 273. See *Bowlin* v. *Nye*, 10 Cush. (Mass), 416; *Packard* v. *Getman*, 4 Wend (N. Y.), 613; *Hawkins* v. *Hoffman*, 6 Hill (N. Y.), 586. And misdelivery is not established by competent evidence. Surmise or conjecture can not be substituted for proof. *Ross* v. *Porteous, Mitchell & Braun Co.*, 136 Me., 118, 3 A., 2 d., 650; *Thibodeau* v. *Langlais*, 131 Me., 132, 159 A., 720; *Averill* v. *Cone*, 129 Me., 9, 149 A., 297.

It is not necessary to consider other questions claimed to be involved in the case and argued on the briefs, nor the exception to the exclusion of evidence. The plaintiff having failed to prove a wrongful act by the defendant carrier amounting to a conversion and for which trover will lie, this action can not be maintained and the order of nonsuit in the Trial Court must stand.

Exceptions overruled.

YORK COUNTY SAVINGS BANK *vs.* AGLAIE WENTWORTH.

York. Opinion, November 24, 1939.

BANKS AND BANKING. MORTGAGES.

The alleged failure of trustees of savings bank to comply with statutory enactments with reference to making of loans and foreclosure of mortgages securing loans was not a defense to proceeding by bank to recover possession of mortgaged realty.

The legislature never intended that nonconformance by the bank officials with provisions of R. S. 1930, *Chap.* 57, *Secs.* 33 *and* 38, *although mandatory, enacted solely for the proper government of the bank, should enure to the benefit of and constitute a defense for a borrower of the bank's money.*

In action by savings bank to recover possession of realty, evidence consisting

of five mortgages covering realty and notes secured by mortgages was admissible, even though trustees of bank did not comply with statutory enactments with reference to the making of the loans.

A devisee under will of mortgagor stands in the stead of the mortgagor.

A mortgagor can not buy in a tax title and assert it successfully against a mortgagee.

In action by savings bank against devisee under will of mortgagor to recover possession of realty covered by mortgages held by bank, devisee would not be permitted to assert tax title purchased by devisee against the bank, even though devisee was not legally bound to pay the taxes.

On exceptions. Writ of entry brought by mortgagee under Sec. 9 of Chap. 104, R. S. 1930 to recover possession of certain real estate. Case heard before Justice of the Superior Court without intervention of jury. Judgment rendered for plaintiff. Defendant files exceptions as to the admission of testimony and to the decision. Exceptions overruled. Case fully appears in the opinion.

Waterhouse, Titcomb & Siddall, for plaintiff.

Louis B. Lausier, specially,

William P. Donahue, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

(DUNN, C. J., sat at argument but did not participate in the decision in this case because of his death on November 10, 1939.)

HUDSON, J. Writ of entry brought by a mortgagee under Sec. 9 of Chap. 104, R. S. 1930 to recover possession of certain real estate in the City of Saco. Plea, *nul disseisin*. The case was heard by a Justice of the Superior Court without intervention of jury. Sec. 26, Chap. 91, R. S. 1930. Judgment was rendered for the plaintiff. It comes to us on exceptions, first to the admission of certain testimony, and second to the decision.

The admitted evidence consisted of five mortgages covering the real estate in question and the notes secured by them. The defendant contended that the loans evidenced by them were not authorized by the trustees of the bank.

Two sections of the statute in particular, namely, Sections 33 and 38 of Chap. 57, R. S. 1930, are relied upon by the defendant. Sec. 33 provides that "The trustees shall see to the proper investment of deposits and funds of the corporation, in the manner hereinbefore prescribed," and 38 that "The treasurer may, under the direction of the trustees, assign, discharge, and foreclose mortgages, and convey real estate held as security for loans, or the title of which accrued from foreclosure of mortgages, or judgments of courts."

If it be assumed that the trustees did not comply with the statutory enactments with reference to the making of these loans (there are facts in the record from which the Justice might have inferred an unrecorded approval of the loans by the trustees) and to the foreclosure of the mortgages, that fact is not a defense that may be set up in this action. In *Roberts* v. *Lane*, 64 Me., 108, this Court said on page 113:

> "We do not think that any of the directions and restrictions contained in R. S., c. 47, Sec. 14, relative to banks and banking designed for the protection of their stock and bill holders and depositors, should be so construed as to operate adversely to their interests, and to relieve their debtors from the performance of contracts not expressly made void by the statute, and especially contracts which include no illegal element in their essence or obligation."

The Court then discussed *Richmond Bank* v. *Robinson*, 42 Me., 589, and said:

> "It is true there is a *dictum* to that effect in *Richmond Bank* v. *Robinson*, 42 Maine, 589. But it seems to us that the *dictum* is opposed to the decision."

In the next paragraph, the Court stated:

> ". . . but Robinson's claim to resist the suit of the bank because its title to the note accrued by the violation of one of these restrictions was overruled, we think rightly, upon the ground that while such violation might make the directors individually responsible to the bank in case of loss, or might make the bank liable to injunction at the instance of the State, still

'the defendant cannot avail himself of this failure on their part to observe these requirements of the statute; as to him that violation was entirely collateral; it did not enter into or affect his contract.'"

The Court further stated:

"Of course we agree that the law will not lend its aid to compel a man to do that which is forbidden by statute. But there is no law against a man's paying the promissory note which he has made payable to bearer in lawful money, and the violation of law by the plaintiff's agents is entirely collateral. . . . The defendant here objects that there was no vote of the directors of the bank authorizing the transfer of the note in suit to the plaintiff.

"But we think that is a matter between the bank and its officers, of which the defendant cannot avail himself."

In *Farmington Savings Bank* v. *Fall*, 71 Me., 49, a case in which the statute concerned provided: ". . . but no loan shall be made on security of names alone," the Court said on page 53:

"But assuming that the law of New Hampshire is like ours, which is but a direction to the trustees, designed for the benefit and security of depositors, it is not to be so construed as to defeat its own purpose, and enable the makers of negotiable paper to set up defences, to which they would not be otherwise entitled."

The defendant relies on *Gilson* v. *Cambridge Savings Bank*, 180 Mass., 444, 62 N. E., 728, in which a statute in that Commonwealth provided:

"No loan on mortgage shall be made except upon the report of not less than two members of the board of investment, who shall certify to the value of the premises to be mortgaged, according to their best judgment, and such report shall be filed and preserved with the records of the corporation."

The action there was to recover damages for the breach of an alleged contract to lend the plaintiff money on the security of a mortgage

of real estate. The court held for the defendant, but stated on page 446 of 180 Mass., 62 N. E., on page 728:

> "What would be the effect of this provision upon a contract executed in violation of it, it is unnecessary now to decide. We simply hold that an executory contract to lend money, made by a savings bank without such a report, cannot be enforced or made a foundation of a claim for damages."

Also see *Jones* v. *B. F. Butler Cooperative Bank*, 254 Mass., 82, 149 N. E., 657.

In *Greenfield Savings Bank* v. *Abercrombie*, 211 Mass., 252, on page 258, 97 N. E., on page 900, the Court said:

> "We have no doubt that these statutes are mandatory and not merely directory. They are part of a series of careful provisions made to secure the interests of depositors and to make it certain that the conduct of trustees in making loans upon mortgages should be not only honest and careful, but manifestly so, done with the concurrence of other officers, and spread upon the records of the corporation. These are restrictions placed by the Legislature upon the power of the defendants. *A loan made without the observance of these requirements may be valid as between the bank and the borrower or as to third parties* [italics ours]; *Gerrity* v. *Wareham Savings Bank*, 202 Mass., 214; but as between the defendants on the one side and the bank and its depositors on the other side their conduct in making loans in such a manner is ultra vires."

In 7 Am. Jur., Sec. 647, on page 469, we find this statement:

> "The banking laws (and in earlier times bank charters) usually contain restrictions upon loans which the bank may make, and frequently, they either prohibit the making of particular kinds of loans or loans to particular classes of persons, or permit them to be made only under certain conditions. . . . The fact, however, that a bank, in making a loan, violates any such statutory provision does not prevent it from recovering the money loaned or afford the borrower any defense to recovery. . . . Such provisions are intended, as a rule, for the gov-

ernment of the bank. Permitting a borrower who has secured an excessive loan to avoid payment of the money actually received by him would injure the interest of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank."

The legislature never intended that nonconformance by the bank officials with these provisions of the statute, although mandatory, enacted solely for the proper government of the bank, should enure to the benefit of and constitute a defense for a borrower of the bank's money. The justice ruled rightly in admitting this evidence.

The defendant claims title by virtue of certain tax deeds and also from an execution sale in an action of debt to enforce a tax lien. Sec. 28 of Chap. 14, R. S. 1930, as amended. These titles the plaintiff assails as illegal for reasons argued at length, which now, because of what will presently be stated, need not be considered.

The defendant, it seems, is a devisee under the will of the mortgagor, William L. Gerrish. As devisee, she stands in his stead. It is well settled law in this state "that a mortgagor can not buy in a tax title and assert it successfully against a mortgagee, *Dunn* v. *Snell*, 74 Me., 22; *Phinney* v. *Day*, 76 Me., 83. . . ." *Dalton* v. *Lessard*, 136 Me., 94, 96. After giving the argument of the defendant therein, our Court stated in the Dalton case, *supra*, "But the reasons underlying the general doctrine go much deeper than counsel assumes. . . . The decisive factor is not that the obligation to pay the tax rests on the one asserting the title, but the real question is whether on broad equitable grounds he should be estopped to assert the title which he holds."

Here the evidence discloses that this plaintiff, not theretofore having knowledge of these tax sales, was approached by the defendant who stated that if the bank would give her a discount on the interest, she would square up the taxes and interest. She wanted to keep the property. Subsequently thereto, instead of paying the taxes, she bought up the tax titles and now would assert them against the plaintiff. Although she was not legally bound to pay these taxes, it would be inequitable to allow her to defend successfully on these purchased tax titles.

The defendant contended that the record fails to disclose that

she is the devisee named in the Gerrish will, but we think otherwise. The record discloses that not only did the defendant have the above mentioned conversation with the treasurer of the bank, but that shortly after the death of the mortgagor, she informed the treasurer that she was collecting the rents on the property covered by the mortgages. We can not say that, in the absence of any evidence whatsoever to the contrary, there were no facts in the case from which the presiding Justice could not have found that she was the one named in the will as devisee.

The mandate must be,

Exceptions overruled.

SARAH H. GOULD

vs.

MAINE CENTRAL TRANSPORTATION CO.,
ALSO KNOWN AS MAINE CENTRAL BUS LINES.

APPLETON GOULD

vs.

MAINE CENTRAL TRANSPORTATION CO.,
ALSO KNOWN AS MAINE CENTRAL BUS LINES.

Penobscot. Opinion, November 25, 1939.

NEGLIGENCE. COMMON CARRIER.

It is common knowledge that improved highways, even when built of cement, often carry on their surface more or less sand or gravel brought on in the course of travel, as well as small particles of cement loosened by wear or disintegration, all liable to be raised into the air by the winds or the suction of passing travel.

A reasonable inference drawn from established facts is proof, not surmise.

While common carriers of passengers are not bound to insure the absolute safety of their passengers, they are required to make use of such safeguards for the protection of their passengers as science and art have devised, and as experience has proved to be efficacious in accomplishing their object.

It is equally well settled that the mere fact that the appliances used be the latest achievements of mechanical and scientific skill and are such as are in common use does not conclusively prove that the carrier was not negligent. If the appliances are not suitable for use in the transportation of passengers, it is negligence to employ them for that purpose.

A window in a passenger car or motor bus is an "appliance of transportation."

It is for the jury to determine as a fact whether defendant, in permitting window to remain open, observed that degree of care with which the defendant as a common carrier was chargeable.

On motions. Actions by Sarah H. Gould to recover damages for personal injuries received while riding as passenger in bus operated by defendant company; and by husband for incidental losses suffered. Verdicts for plaintiffs. Defendant files general motions for new trials. Motions overruled. Cases fully appear in the opinion.

Stern & Stern, for plaintiffs.

Edward S. Anthoine,

Bernstein & Bernstein, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

(DUNN, C. J., sat at argument but did not participate in the decision in this case because of his death on November 10, 1939.)

STURGIS, J. In these actions on the case to recover damages for personal injuries received by Sarah H. Gould while riding as a passenger in a bus operated by the Maine Central Transportation Co. and for incidental losses suffered by Appleton Gould, her husband, verdicts for the plaintiffs were returned in the Trial Court. The cases come forward on the defendant's general motions for new trials.

In an earlier trial of these actions, when the plaintiffs had put in their cases, the defendant rested without presenting any evidence

and, on its motion, was granted directed verdicts. Exceptions were sustained. *Gould* v. *Maine Central Transportation Co.*, 136 Me., 83, 1 A., (2d) 908. Adhering to the settled rule that the evidence, which all came from the plaintiffs, must be viewed in the light most favorable to them, it was there stated that:

> "The jury could have found that on June 13th, 1936, Mrs. Gould purchased tickets for herself and some relatives for their transportation from Bangor to Newburyport by bus owned and operated by the defendant company; that these tickets had on them seat numbers; that the bus driver showed Mrs. Gould to her seat, which was the inside seat on the first row to the left of the aisle and facing the windshield; that immediately in front of her seat and to the left of the driver's windshield was an open window, with nothing whatsoever to protect her from any object coming through it, which the bus driver permitted to remain open while he drove at a speed of about fifty (50) miles per hour; that while the bus was so proceeding near Gray, she felt something strike her in the eye 'with such force that it felt like a cannon ball' and she screamed, 'Stop the bus, stop the bus, something came in the window, and struck me in the eye'; and that thereby she received serious injuries, ..."

And attention was called to the fact then of record that, although it was admitted that something hit the passenger's eye, it was not definitely known what the object was, nor from whence it came.

The Court then reaffirmed the rule that the defendant, the Maine Central Transportation Co., as a common carrier, in the operation of its bus was not bound as an insurer but owed the duty to its passengers to exercise the highest degree of care compatible with the practical operation of the machine in which the conveyance was undertaken. *Chaput* v. *Lussier*, 132 Me., 48, 52, 165 A., 573, and cases cited. And it was held that the failure of the Trial Court to allow the jury to determine whether the defendant exercised requisite care in the "preparation and management" of its bus with reference to the open window and should have reasonably anticipated to result therefrom "peril or injury" to its passenger was error.

At the retrial of these cases, upon which this review is based, the plaintiffs again offered substantially the same evidence in support of the allegations of their writs, but were able to show that the object which hit the passenger's eye was a small, rough, sharp-edged, non-metallic particle having the appearance of a stone. This evidence was sufficient to take the cases to the jury. *Gould* v. *Maine Central Transportation Co.*, supra. Unless a valid and sufficient defense is found in the record, the verdicts rendered were warranted.

Counsel for the Maine Central Transportation Co., now as before, argue on the brief that the injury to the passenger's eye is not established by competent evidence. This Court is of the opinion, however, that upon the facts clearly proven the jury were warranted in reaching the conclusion, as they evidently did, that a particle of dirt or cement came in through the open window of the bus, struck the passenger's eye with great force, and caused the injury of which she complains. It is common knowledge that improved highways, even when built of cement, often carry on their surface more or less sand or gravel brought on in the course of travel, as well as small particles of cement loosened by wear or disintegration, all liable to be raised into the air by the winds or the suction of passing travel. And no intelligent person of this generation is unaware of the powerful inrush of air through an open window in the front end of a motor vehicle travelling at a speed of fifty miles an hour. Without a semblance of proof that the object which injured the passenger's eye came from any other source, it was a warranted inference that it was drawn in through the open window behind which she sat. A reasonable inference drawn from established facts is proof, not surmise.

In behalf of the Maine Central Transportation Co., it was proved that the vehicle in which this accident occurred was a 1935 passenger bus produced by a well-known manufacturer, had all the latest appliances and accouterments then furnished for and used in passenger vehicles of that type, and at that time passenger busses were not equipped with no-draft windows, so-called, nor windshields, screens or any protection whatsoever for passengers seated by or back of open windows. There was also evidence that the window through which came the object which injured the plaintiff passenger was left open for ventilation. Upon these facts, the carrier,

through its counsel, argues on the brief that as a matter of law it can not be held liable for the injuries and losses which the plaintiffs here suffered.

In *Knight* v. *Portland, Saco & Portsmouth R. R. Co.*, 56 Me., 234, quoted in *Gould* v. *Maine Central Transportation Co.*, supra, approval was given to the statement that while common carriers of passengers are not bound to insure the absolute safety of their passengers, "they are required to make use of such safeguards for the protection of their passengers as science and art have devised, and as experience has proved to be efficacious in accomplishing their object." This rule of law is abundantly supported by the authorities. 10 Corpus Juris 955, n. 37 and cases cited. But it is equally well settled that the mere fact that the appliances used be the latest achievements of mechanical and scientific skill and are such as are in common use does not conclusively prove that the carrier was not negligent. If the appliances are not suitable for use in the transportation of passengers, it is negligence to employ them for that purpose. *Transportation Co.* v. *Harvey*, 15 Fed. (2d), 166; *Jacobi* v. *Builders' Realty Co.*, 174 Cal., 708, 164 P., 394; *I. C. R. R. Co.* v. *O'Connell*, 160 Ill., 636, 43 N. E., 704; *Creason* v. *Railroad*, 149 Mo. App., 223; 130 S. W., 445; *Dougherty* v. *Rapid Transit Railway*, 128 Mo., 33, 30 S. W., 317; 3 Thomp. Neg., Sec. 2792; 13 C. J. S. 1389. A window in a passenger car or motor bus is an "appliance of transportation." *Orms* v. *Traction Bus Co.*, 300 Penna., 474, 150 A., 897.

The contention made by the Maine Central Transportation Co. that it used standard appliances and equipment in its bus seems, however, to be of little if any importance in these cases. No question is raised as to the mechanical sufficiency of the window or its construction. Whether it was guarded by a windshield, screen or other protector is beside the point. It was not and yet it was left open. We must again, on these motions, hold, as in our earlier opinion when the case came forward on exception, that conceding it was a hot day and proper ventilation was necessary, it was "for the jury to determine as a fact whether the defendant, in permitting this window to remain open, observed that degree of care with which the defendant as a common carrier was chargeable. Could it reasonably have anticipated peril to its passenger and likely injury to her from its

failure to close the window in operating its bus at such a speed and creating thereby such a draft as likely to suck into the bus small objects, whether insects or otherwise, that might be in the air immediately in front of the open window? . . . We cannot say that as a matter of law there was observance of such care. It was a factual question for the jury's determination."

There is no claim made that the damages awarded were excessive. The jury has passed upon the facts and rendered their verdicts. We find no sufficient ground for setting them aside. In each case, the entry is

Motion overruled.

GEORGE M. LOWDEN *vs.* PHILIP A. GRAHAM.

Lincoln. Opinion, December 6, 1939.

TAXATION. TOWNS.

The sale of land for taxes is a procedure in invitum, *and the provisions of the statute authorizing such sale must be strictly complied with or the sale will be invalid.*

The word "place" has a wide range of meaning, dependent upon the connection in which it is used, but its dictionary definition, adopted in many decisions, is: "Any portion of space regarded as distinct from all other space, or appropriated to some definite object or use."

Strict compliance with provisions of statute authorizing tax sale is essential to validity thereof.

On report. Action by George M. Lowden against Philip A. Graham involving title to a lot of land in the Town of Boothbay, Maine. Judgment for plaintiff. Damages assessed at $1.00 with costs. Case fully appears in the opinion.

Tupper & Harris, for plaintiff.

Perkins & Perkins,

Pattangall, Goodspeed & Williamson, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

(DUNN, C. J., sat at argument but did not participate in the decision in this case because of his death on November 10, 1939.)

MANSER, J. On report. Title to a lot of land in the Town of Boothbay, Maine, is involved. The plaintiff claims under a deed from the former owner. The defendant claims this deed was ineffectual to convey title as the land in question had previously been sold for delinquent taxes to the Town of Boothbay and by it later conveyed to the defendant. The plaintiff attacks the validity of the tax sale in two particulars. If either of these points is sustained, the stipulation is that the plaintiff shall be entitled to judgment with nominal damages and costs. If neither of the points is sustained, then the defendant prevails and is entitled to judgment and costs. The first question presented to the Court is:

1. Was the tax sale in question at the place where the last preceding annual town meeting was held under the statute?

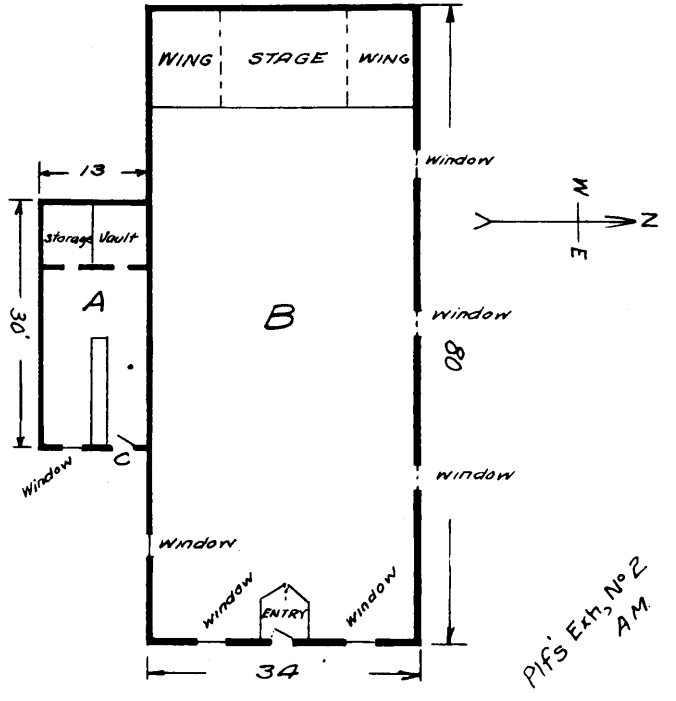
The taxpayer was a non-resident owner and the statutory provision relating to sales of real estate for taxes is found in R. S., Chap. 14, Sec. 72, as follows:

> "If the taxes, interest and charges are not paid on or before such first Monday in February, so much of the estate as is sufficient to pay the amount due therefor with interest and charges will be sold without further notice, at public auction, on said first Monday in February, at nine o'clock in the forenoon, at the office of the collector of taxes, in cities, and at the place where the last preceding annual town meeting was held, in towns."

It is the contention of the plaintiff that there was non-compliance with this requirement of the statute. It was stipulated and agreed that the last preceding annual town meeting was held in the town hall and that the tax sale was held at the town office. It becomes material to consider carefully the facts existent in the present case, and which are not disputed, to determine whether the town office can prop-

erly and legally be regarded as the place where the last preceding annual town meeting was held.

The town building is located on a plot of land bordering on a state highway and with open space about it convenient for the parking of automobiles. A plan drawn to scale was used as an exhibit. It is here reproduced in miniature:



[This drawing reduced about one-third]

It will be seen that the town hall, marked B, is 34 feet wide and 80 feet long, with a clear area of approximately 2,250 square feet. A door in the center of the front end is the only means of entry or exit.

The room, or building, used as the town office, marked A, abuts the town hall. It is placed about midway of the southerly wall and is 30 feet long by 13 feet. There is no intercommunication between this office and the town hall. Ingress and egress are via a single door at the front end. Between the two rooms is a solid wall, plastered on both sides. Ordinary town business is transacted in the town office. The entrances to the two separate parts of the building are in clear view from the street.

A cardinal principle in determining the validity of tax sales has been iterated and reiterated in the decisions of our Court. It is known as the rule of strict construction. Apt citations are:

> "The sale of land for taxes is a procedure *in invitum*, and the provisions of the statute authorizing such sale must be strictly complied with or the sale will be invalid." *French* v. *Patterson*, 61 Me., 203 at 210.

> "As the plaintiff's title is founded solely upon the provisions of the statute, such provisions must be strictly complied with." *Greene* v. *Lunt*, 58 Me., 518 at 532.

> "It has, therefore, been held, with great propriety, that, to make out a valid title, under such sales, great strictness is to be required; and it must appear that the provisions of law preparatory to, and authorizing such sales, have been punctiliously complied with." *Brown* v. *Veazie*, 25 Me., 359.

> "To prevent forfeitures strict constructions are not unreasonable." *Cressey* v. *Parks*, 76 Me., 532.

> "It is deemed essential to the validity of a tax sale of lands that there shall be a strict compliance with all the directions of the statute." *Kelley* v. *Jones*, 110 Me., 360, 86 A., 252, 255.

See also *Baker* v. *Webber*, 102 Me., 414, 67 A., 144; *Ladd* v. *Dickey*, 84 Me., 190, 24 A., 813.

Recurring to the particular provision of the statute under consideration, being the requirement that the tax sale shall be held at

the *place* where the last preceding annual town meeting was held, we find that, while the word "place" has a wide range of meaning dependent upon the connection in which it is used, its dictionary definition, adopted in many decisions, is:

> "Any portion of space regarded as distinct from all other space, or appropriated to some definite object or use." *Prentiss* v. *Davis*, 83 Me., 364, 22 A., 246; Words & Phrases, 4th ser.
>
> "It is applied to any locality, limited by boundaries, however large or however small." *Law* v. *Fairfield*, 46 Vt., 425; 48 C. J., p. 1211.

The rule of strict construction obtains, not only in Maine, but generally throughout the country. Judicial, execution, and statutory sales result in an involuntary alienation of property from its owner. Courts guard with jealous care the rights and interests of persons whose property is sold under such processes. So we find in *Jones* v. *Rogers*, 38 So., 742 (Miss.), the following:

> "The Mississippi statute which governed such sales at the time this one was made provided that all sales of land should be made at the *courthouse* of the *county*, and on the first and third Mondays of each month. Section 17, Act June 22, 1822 (How. & H. Dig. p. 633). Decisions of the Supreme Court of the United States, as well as of various states, have placed beyond the realm of controversy the proposition that United States marshals, in the sale of property under execution, *must* sell it in *strict conformity* to the state law, otherwise it is void, and can confer no title whatever. *Smith* v. *Cockrill*, 6 Wall, 756, 18 L. Ed., 973; *Bornemann* v. *Norris* (C.C.), 47 Fed., 438. Statutes fixing the place of sale of lands under executions are *mandatory*, and *not* merely *directory*, and it is the *imperative* duty of officers to make such sales at the very place designated, and a sale made at any *other* place is not *voidable* merely, but absolutely *null* and *void*. The place of sale is the very *essence* of the sale and strict compliance with the statute is absolutely essential in order to transfer a good title to realty. *Koch* v. *Bridges*, 45 Miss., 257; *Loudermilk* v. *Corpening*, 101 N. C., 649, 8 S. E., 117; *Sinclair* v. *Stanley*, 64 Tex., 67. In *Moody's*

Heirs v. *Moeller* (Tex. Sup.), 10 S. W., 727, 13 Am. St. Rep. 839 (the Texas statute being the same as Mississippi's as to the place of sale), a United States marshal made the sale, not in front of the door of the *courthouse* of the *county*, but in front of the door of the *United States Court* building, standing just on the opposite side of the street from the county courthouse. The court held that the sale was not simply and merely *voidable*, but was absolutely *void*, incapable of ratification, and subject to a *collateral* attack, and that the acquiescence of the defendant in the execution in such a void judicial sale gave no validity to it."

See also *Hoffman* v. *Anthony*, 6 R. I., 282, 75 Am. Dec. 701, and annotations thereunder.

Giving effect and application to the strict rules which the courts have laid down, we must find that the statutory requirement as to place of sale was not complied with. If citizens and voters of the Town of Boothbay went to and remained in the town office on the day of the annual town meeting, they were not at the place where such meeting was held and could not see, hear or participate therein. Those who were in attendance at the town hall, where the meeting was held, could know nothing of any business being transacted in the town office.

The second point raised was with reference to the description of the property in the tax deed, but this is not necessary of decision in view of the conclusion reached with reference to the first point.

The entry will be

Judgment for plaintiff.
Damages assessed at $1 *with costs.*

STATE OF MAINE *vs.* FRANK E. BRADBURY.

York. Opinion, December 11, 1939.

COMMON LAW. CRIMINAL LAW. DEAD BODIES.

The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.

It is because the common law gives expression to the changing customs and sentiments of the people that there have been brought within its scope such crimes as blasphemy, open obscenity, and kindred offenses against religion and morality, acts which, being highly indecent, are contra bonos mores.

The common law casts on some one the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose.

Any disposal of a dead body which is contrary to common decency is an offense at common law.

It is a crime at common law to burn a body in such a manner that, when the facts should in the natural course of events become known, the feelings and natural sentiments of the public would be outraged.

On exceptions. Respondent charged with unlawfully and indecently burning a human body. Case tried before a jury. At close of evidence respondent filed a motion for directed verdict which was denied and, after conviction, filed motion in arrest of judgment, which was denied. Exceptions were filed. Exceptions overruled. Case fully appears in the opinion.

Joseph E. Harvey, County Attorney, for the State.

Hilary F. Mahaney, for respondent.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

(DUNN, C. J., sat at argument but did not participate in the decision in this case because of his death on November 10, 1939.)

THAXTER, J. The respondent, Frank E. Bradbury, lived with an unmarried sister, Harriet, in a two-and-a-half story building situated on Main Street in the City of Saco. They were old people and the last survivors of their family. In June, 1938, Harriet was in failing health. She appears to have suffered some injury from a fall and during the night of June 9 she remained in a reclining chair in the front room of their home. About four o'clock in the morning of June 10 she died. The respondent thereupon built a hot fire in the furnace in the basement of the house, tide a rope around the legs of his sister's body, dragged it down the cellar stairs, shoved it into the furnace and burned it. It was impossible to get it all into the fire box at once, but as the head and shoulders were consumed, he forced it in farther and farther until he was able to close the furnace door. Reverend Ward R. Clark, who lived in the house next door, testified that during the morning of June 10 a heavy, dark smoke, with a very disagreeable odor poured from the chimney of the house. The next day an investigation was made by the authorities, who asked the respondent to show them the remains of his sister. Going to the basement of the house, he took down the crank used for shaking down the furnace, turned over the grates, shovelled out the ashes and said: "If you want to see her, there she is." A few bones were found; the rest of the body had been consumed.

The indictment charged that the respondent "with force and arms, unlawfully and indecently did take the human body of one Harriet P. Bradbury, and then and there indecently and unlawfully put and place said body in a certain furnace, and then and there did dispose of and destroy the said body of the said Harriet P. Bradbury by burning the same in said furnace, to the great indecency of Christian burial, in evil example to all others in like case offending, against the peace of said State and contrary to the laws of the same."

At the close of the evidence the respondent's counsel filed a motion for a directed verdict which was denied, and after conviction filed a motion in arrest of judgment which was likewise denied. To each of such rulings an exception was taken.

The facts are not in dispute. The motion in arrest of judgment presents the issue as to whether the indictment sets forth any crime, the motion for a directed verdict whether the evidence which sup-

ports the allegations of the indictment establishes any crime. The question in each case is the same.

The offense is not covered by the provisions of R. S. 1930, Chap. 135, Sec. 47, which makes it an offense to disinter, to conceal, to indecently expose, to throw away or to abandon a human body; and it is important to note that the indictment does not charge the violation of any statute. The question for us to decide is whether this was a crime under the common law.

Judge Holmes, in speaking of the common law as applicable to crimes has well said: "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." Holmes, Common Law, p. 41. And in *Pierce* v. *Proprietors of Swan Point Cemetery*, 10 R. I., 227, a case involving rights of sepulture, the court discusses the application thereto of the principles of the common law and quotes from a report published in 1836 by Joseph Story, Simon Greenleaf and others on the Codification of the Laws of Massachusetts. With reference to the common law, this says in part: " 'In truth, the common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form, which fall within the letter of the language, in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce, and the mechanic arts, and the exigencies and usages of the country.' "

It is because the common law gives expression to the changing customs and sentiments of the people that there have been brought within its scope such crimes as blasphemy, open obscenity, and kindred offenses against religion and morality, in short those acts which, being highly indecent, are *contra bonos mores*. *Rex* v. *Lynn*, 1 Leach's Crown Cases, 497; Bishop's Criminal Law, 9 ed. Chap. 36; 49 Harv. L. Rev. 593.

The proper method for disposal of the dead has been regulated by law from earliest times, on the continent of Europe by the canon law, and in England by the ecclesiastical law. See *Pierce* v. *Proprietors of Swan Point Cemetery*, supra, 235 *et seq.*; *Larson* v.

Chase, 47 Minn., 307, 50 N. W., 238, 14 L. R. A., 85; *Anderson* v. *Acheson*, 132 Ia., 744, 110 N. W., 335, 9 L. R. A. (N.S.), 217. But even in England where the subject has been largely committed to the ecclesiastical courts, the principles of the common law have been held applicable and the courts have not hesitated to apply them to give effect to the well recognized customs of the day and age. *Rex* v. *Lynn*, supra; *Reg* v. *Stewart*, 12 Ad. & E., 773.

In *Reg* v. *Stewart*, supra, 778, the rule is broadly laid down in the following language: "We have no doubt, therefore, that the common law casts on some one the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose. The feelings and the interests of the living require this, and create the duty: . . . ."

In this country the subject is governed quite largely by statute and where no statutory provision is applicable by the principles of the common law; and the general doctrine laid down in *Reg* v. *Stewart*, supra, modified only by changing usages, has been almost universally followed. *Larson* v. *Chase*, supra; *Pierce* v. *Proprietors of Swan Point Cemetery*, supra; *Thompson* v. *State*, 105 Tenn., 177; *Patterson* v. *Patterson*, 59 N. Y., 574; *Anderson* v. *Acheson*, supra; Note L. R. A., 1918 D, 281.

In our own state some time before the decision in *Reg* v. *Stewart*, it was held that the indecent disposal of a human body was an offense at common law. *Kanavan's Case*, 1 Me., 226. The second count of the indictment in this case charged that the respondent "unlawfully and indecently took the body" of a child "and threw it into the river, against common decency." The respondent maintained that the offense was not indictable at common law and filed a motion in arrest of judgment. The indictment was held good. The Court said, page 227:

> "From our childhood we all have been accustomed to pay a reverential respect to the sepulchres of our fathers, and to attach a character of sacredness to the grounds dedicated and inclosed as the cemeteries of the dead. Hence, before the late statute of *Massachusetts* was enacted, it was an offense at common law to dig up the bodies of those who had been buried, for the purpose of dissection. It is an outrage upon the public feel-

> ings, and torturing to the afflicted relatives of the deceased. If it be a crime thus to disturb the ashes of the dead, it must also be a crime to deprive them of a decent burial, by a disgraceful exposure, or disposal of the body contrary to usages so long sanctioned, and which are so grateful to the wounded hearts of friends and mourners."

This case seems to lay down the doctrine that any disposal of a dead body which is contrary to common decency is an offense at common law. But counsel for the respondent in the case before us argues that cremation is now a well recognized method of disposing of a dead body and cites the case of *Reg* v. *Price*, 12 Q. B. D., 247, as an authority that on the facts of the instant case no crime has been committed. If this case upholds the doctrine for which he contends, it does not represent the law in this country. A careful reading of it, however, satisfies us that the court did not intend to lay down any such principle. The question considered was a very narrow one, "whether," to use the language of the court, "to burn a dead body instead of burying it is in itself an illegal act." The question is answered as follows, page 254: "I am of opinion that a person who burns instead of burying a dead body does not commit a criminal act, unless he does it in such a manner as to amount to a public nuisance at common law." And in the case before us the essence of the offense charged and proved is, not that the body was burned, but that it was indecently burned, in such a manner that, when the facts should in the natural course of events become known, the feelings and natural sentiments of the public would be outraged.

We are satisfied that the indictment charges an offense at common law and that the presiding Justice committed no error in overruling the motion for a directed verdict and the motion in arrest of judgment.

Exceptions overruled.

VIOLA NEELY, ADM'X *vs.* HAVANA ELECTRIC RAILWAY COMPANY.

Kennebec. Opinion, January 8, 1940.

EXECUTORS AND ADMINISTRATORS. CORPORATIONS. CONTRACTS.

STATUTE OF LIMITATIONS.

It is well settled that a debt is an asset in the hands of the creditor while living and that on his death it becomes an asset of his estate at the residence of the debtor.

Decrees of probate courts in matters of probate, within the authority conferred upon them by law, are, when not appealed from, conclusive on all persons and are not subject to collateral attack.

When president of a corporation had negotiated with deceased, and with others, over a long period of time, and none of his acts had been questioned by the corporation, and where, in every instance, the acts seem to have been ratified and the corporation had paid deceased large sums of money in carrying out its part of the various agreements, the authority of the president to act for the corporation will be implied.

Where corporation paid deceased, for a period of six years, a large sum of money, in accordance with contract, it must be assumed, until the contrary appears, that those payments were for a valid consideration and were not a wrongful diversion of the corporate funds.

In interpreting provision of contract, Law Court must look at the substance of what took place rather than at the form.

The statute of limitations does not commence to run against a claim in favor of the estate of a deceased person accruing after death until the appointment of an administrator or an executor.

A cause of action for payments on contracts accruing after death of deceased in 1930, *was not barred by limitations, where administration was not taken out until* 1937.

On report. Action in assumpsit by plaintiff, as administratrix of the estate of Roy H. Neely, to recover payments claimed to be due from the defendant on a contract. Judgment for the plaintiff for

$18,500, with interest from the date of the writ. Case fully appears in the opinion.

Gordon F. Gallert,
Harvey D. Eaton,
Murray L. Halpern, for plaintiff.
McLean, Fogg & Southard, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. The plaintiff, as administratrix of the estate of Roy H. Neely, appointed by the Probate Court in and for the County of Kennebec, brings this action of assumpsit to recover payments claimed to be due from the defendant under a contract evidenced by certain correspondence and related documents which will be referred to later. The case is before us on report.

May 1, 1910, the Havana Electric Railway Company wrote to Mr. Neely accepting an offer from him to take over certain rights, which had previously been granted to Barron G. Collier, Inc., to place advertising matter in all of the fixed upper glasses in the cars of the Havana Electric Railway Company. The concession was to run from May 1, 1910, to December 31, 1913, and for it Neely was to pay $400 per month. There was a provision for rescission under certain conditions, and in case of such rescission the company was to pay Neely all sums received by it for such advertising over and above the sum of $4,800 per annum. Such payments were to be paid "as compensation for looking after the maintenance of the said advertisements and all other affairs connected therewith."

Before this contract expired, the Havana Electric Railway Light & Power Company appears to have succeeded to the rights of the railway company and to have assumed its obligations; and in 1926 this defendant, a Maine corporation, succeeded to the rights and assumed the obligations of the power company. For our purposes, however, these various corporate transformations are not important, and the case will be treated as if the present defendant, which will be referred to as the company, were the only one involved.

On October 15, 1913, the contract was extended to November 30, 1918. Thereafter but on the same day the company signed a con-

tract with the Henry Clay and Bock & Co., Ltd., granting to it the privilege at a rental of $10,000 per year for a period of five years from December 1, 1913. As a consequence the company exercised the privilege of rescission contained in its contract with Neely and became obligated to pay Neely the difference between the $4,800 which he was to pay and the $10,000 which it was to receive under the new arrangement. In accordance with the agreement this payment was to be for "compensation for looking after the maintenance of the advertisements and all other affairs connected therewith."

August 9, 1918, the company wrote a letter to Henry Clay and Bock & Co., Ltd., extending the agreement for twelve months from its expiration or until December 1, 1919, and there is a notation on this letter that the contract with Mr. Neely was extended for a like period. There is no writing continuing the agreement beyond this time but it is apparent from the acts of the parties and from subsequent correspondence that it was extended for another five years to expire November 30, 1924.

On April 17, 1924, the company wrote a letter to Neely suggesting a new arrangement to take effect December 1, 1924, and to run to December 1, 1940. As the proposition set forth in this letter, which was accepted by Neely, is the basis for the present action, we set it forth in full:

"'HAVANA ELECTRIC RAILWAY, LIGHT & POWER CO.
Havana

F. Steinhart, Pres.
and General Manager

Havana, Cuba, April 17th, 1924.

Mr. Roy H. Neely
Havana, Cuba.

Dear Sir:

The contract heretofore entered into with the HENRY CLAY AND BOCK & CO., LTD., having practically expired, inasmuch as the said Company has transferred its contract, which expires November 30th, 1924, to the COMPANIA ANUNCIADORA LUMINICA S. A., the HAVANA ELECTRIC RAILWAY LIGHT AND

POWER COMPANY has made arrangements with the BARRON G. COLLIER, INC., Candler Building, New York City, New York, for advertising on the fixed upper window glasses in the cars of this Company from December 1st, 1924, to December 1st, 1940, and in view of the rights heretofore acquired by you for advertising on the said fixed upper window glasses, the HAVANA ELECTRIC RAILWAY LIGHT AND POWER COMPANY will pay to you from the amount received from the BARRON G. COLLIER, INC., the sum of Six thousand ($6,000.00) dollars per year, the same as up to date, in monthly installments of Five Hundred ($500) dollars each during the time the said BARRON G. COLLIER, INC., exercise their advertising privileges.

Kindly express your acceptance of the above in a duplicate copy of this letter for the files of the Company.

Very truly yours,

F. STEINHART
President.

HAVANA ELECTRIC RAILWAY LIGHT AND POWER CO.
I hereby accept the above:
ROY H. NEELY.'"

Payments were made under this agreement each month at the rate of $500 per month including the one due October 1, 1930, which covered the month of October of that year. On October 3 Neely died. The company informed Mrs. Neely by letter dated December 12, 1930, that it could make no further payments as the contract was a purely personal matter of Mr. Neely and the company's obligation under it ended at his death.

Numerous defenses are set up in a brief statement. In so far as they are relied on in argument they may be summarized as follows:

1. That the appointment of Mrs. Neely as administratrix was void because the Probate Court in and for the County of Kennebec was without jurisdiction.
2. That there was no valid contract existing between Neely and company because
   a. It was *ultra vires*.

b. There was no authority shown on the part of the officers of the company who purported to make the agreement.

3. That if any contract existed it was a contract for personal services and ended with Neely's death.
4. That it was limited by its provisions to the time Barron G. Collier, Inc., exercised its advertising privileges and as payments were to be made from moneys received from Barron G. Collier, Inc., and since the contract was assigned by Barron G. Collier, Inc., to the Latin American Car Advertising Company, the defendant was under no obligation to Neely or to his estate.
5. That there was a prior obligation on the part of Neely to pay $400 per month which he has not paid.
6. That recovery is barred by the statute of limitations.

We shall consider these in their order.

1. The defendant was incorporated under the laws of Maine in 1926 and is a citizen thereof. It is well settled that a debt is an asset in the hands of the creditor while living and that on his death it becomes an asset of his estate at the residence of the debtor. *Saunders* v. *Weston*, 74 Me., 85; *Brown* v. *Smith*, 101 Me., 545, 64 A., 915. We do not understand that defendant's counsel contend otherwise. But they claim that the Probate Court was without jurisdiction to grant administration under the provisions of R. S. 1930, Chap. 75, Sec. 9, because a prima facie case showing that the debt was due had not been made out. No authority is, however, cited in support of such contention; and it may well be asked how such a claim could be established even prima facie without the appointment of an administrator within this jurisdiction who would have authority to bring suit. The record discloses no want of jurisdiction in the Probate Courts which granted administration to this plaintiff; and it is well settled that decrees of Probate Courts in matters of probate, within the authority conferred upon them by law, are, when not appealed from, conclusive on all persons and are not subject to collateral attack. *Harlow* v. *Harlow*, 65 Me., 448; *Snow* v. *Russell*, 93 Me., 362, 45 A., 305; *Chaplin, Judge of Probate* v. *National Surety Corporation*, 134 Me., 496, 185 A., 516; *Havana Electric Railway Co., Ap'lt, In re Estate of Roy H. Neely*, 136 Me., 79, 1 A., 2d, 772. The plaintiff can properly maintain this suit.

2. The claim that the contract was *ultra vires* seems to be based on the assumption that the company received nothing in return for its promise to pay Neely. This question of want of consideration will be discussed later.

Assuming the contract is otherwise lawful, we do not see how it can be successfully attacked on the ground that Mr. Steinhart did not have authority to bind the company. He was its president and had negotiated with Neely and with others on this matter over a long period of time and none of his acts had ever been questioned by the company. On the contrary in every instance they seem to have been ratified and the company had paid Neely large sums of money in carrying out its part of the various agreements. Under such conditions his authority to act for the company will be implied. *Hazeltine* v. *Miller*, 44 Me., 177.

3. The defendant strenuously contends that this was a contract for personal services and ended with the death of Neely.

It is true as claimed by the defendant that when the arrangement was first made between Neely and the company Neely did have services to perform in connection with the advertising. The letters of May 1, 1910, and October 15, 1913, recite that payments to Neely are "compensation for looking after the maintenance of the advertisments and all other affairs connected therewith." It is significant that this language is omitted from the letter of April 17, 1924. That letter, except for the recital that the monthly payments are to be the same, indicates an entirely different arrangement. The advertising concession is turned over to Barron G. Collier, Inc.; and in view of "the rights heretofore acquired" by Neely, he is to be paid $6,000 per year from December 1, 1924, to December 1, 1940, out of money received from Barron G. Collier, Inc. In so far as the agreement indicates, there were to be no services performed by Neely. It is difficult to see how there could be any, because the whole matter was in the control of the new holder of the concession.

Not only does the correspondence show that Neely was to be paid a sum in installments as compensation for rights previously acquired, but a careful reading of the evidence satisfies us that from December 1, 1924, till his death he performed no personal services in connection with it. The agreement between the company and Barron G. Collier, Inc., dated March 21, 1924, indicates that the new

owner was to do all the work in connection with the placing of the advertisements in the cars. The testimony of Charles W. Ricker, the assistant general manager and chief engineer of the company, and ten exhibits introduced in evidence with that testimony, prove that Neely did have duties to perform; but it is significant that such evidence refers to a time prior to 1924. On the other hand, the testimony of Bernard V. Swenson, an employee of the Collier Company, shows that this company's own men took over the work formerly done by Neely. In this respect the acts done in performance of the contract are in accord with the interpretation which we feel its language compels. The general statement by Salvador Soler Y Cabezas, the assistant treasurer of the defendant, and the conclusion of Mario DeJ. Augulo Y DeCardenas that the payments to Neely were for services rendered do not overcome the force of such other evidence.

The defendant argues that if such is the interpretation of the agreement there was no consideration for the payments made to Neely. We do not see why this conclusion must follow. It is true that the evidence does not show what the consideration was. But the letter of April 17, 1924, recites a consideration and there is nothing in the evidence to contradict that recital. Moreover for a period of six years the company made payments to Neely of $6,000 per year in accordance with the provisions of that letter; and we must assume until the contrary appears that those payments were for a valid consideration and were not a wrongful diversion of the corporate funds.

The letter on its face shows a contract under the terms of which the company agreed to pay Neely $6,000 per year until December 1, 1940, out of money received from Barron G. Collier, Inc., and until Neely's death that agreement was carried out. It was not a contract for personal services and did not terminate with Neely's death.

4. The contract was limited to the "time the said Barron G. Collier, Inc., exercises their advertising privileges." In interpreting this provision we must look at the substance of what took place rather than at the form. January 1, 1929, the Collier company assigned the contract to the Latin American Car Advertising Company. This company was registered in Cuba and in accordance with terms of a letter from the Collier company to the Havana Electric

Railway Company the assignment was made because of tax conditions. The letter specifically states that Barron G. Collier, Inc., is not released from its obligations and that the measure is "more or less perfunctory action." The defendant thereafter continued to treat its contract with Neely as still in force and properly so. It can not now claim after his death that this purely formal action on the part of the Collier Company released it from its obligation.

5. Whether Neely was in default on any payments to be made by him on contracts prior to that of 1924 is a matter of but little importance. The letter of April 17, 1924, seems to show a clean slate at that time, and in any event any prior defaults were taken care of by that contract. Under its provisions there was no obligation on Neely to make any further payments.

6. The defendant admits that by the great weight of authority the statute of limitations does not commence to run against a claim in favor of the estate of a deceased person accruing after death until the appointment of an administrator or an executor. *Murray* v. *East India Co.*, 5 B. & Ald., 204; *Root* v. *Lathrop*, 81 Conn., 169, 70 A., 614; *Clark* v. *Amoskeag Manufacturing Co.*, 62 N. H., 612; *Riner* v. *Riner*, 166 Pa., 617, 31 A., 347; see also cases cited in Note 74 A. L. R., 837. We see no reason for not following the general rule. As administration was not taken out until 1937 the statute of limitations is not a bar to a recovery in this case.

This brings us to a consideration of the amount due the plaintiff.

Plaintiff's counsel has submitted figures taken from the record showing payments to the defendant under the Collier contract amounting to $47,500.00 commencing November, 1930; and claims as we understand it $40,500.00 being for payments at the rate of $500.00 per month from October, 1930, to the date of the writ. We are satisfied that a proper construction of the agreement requires that each year should be treated as a separate entity, and that only payments received during a year or properly allocable to a certain year can be considered in determining the amount due. Under this method of figuring, the plaintiff is entitled to $1,000.00 for the balance of the year 1930. Payments seem to have ended in August, 1931, but as to that time $23,250.02 for that year had been turned over, the plaintiff is entitled to recover the full amount of $6,000.00. In August, 1932, the terms of the 1924 agreement were amended.

Under the contract as so modified the Collier Company was to pay a certain percentage of the advertising receipts but with a minimum amount of $1,000.00 per month, and in addition $250.00 per month on back payments. Under this arrangement there was paid from August, 1932, to December, 1932, inclusive, the sum of $6,500.00. $1,000.00 of this amount was, however, properly allocable to the year 1931. As a consequence the plaintiff was entitled to receive for the year 1932 the sum of $5,500.00. Thereafter no more payments were made until February, 1935. There was paid in 1935, and in January, 1936, but properly allocable to 1935, the sum of $12,000.00. There is a suggestion that these payments were also in settlement of amounts due for 1933 and 1934 but we are not satisfied that this is so, and conclude that this amount was properly allocable to 1935. From such payments the plaintiff is entitled to receive the sum of $6,000.00 for that year. Commencing with 1936 an entirely new arrangement was made. Whether there was at that time a rescission of the contract of 1924 which would release the defendant from its obligation under the Neely contract, it is unnecessary to decide, for there is nothing in the record to show what payments were made for the years 1936 and 1937. We therefore hold that the plaintiff is entitled to recover $1,000.00 for the year 1930, $6,000.00 for the year 1931, $5,500.00 for the year 1932, and $6,000.00 for the year 1935. The entry will therefore be:

Judgment for the plaintiff for $18,500 *with interest from the date of the writ.*

(DUNN, C. J., having deceased, did not join in this opinion.)

ALLEN R. LAWYERSON *vs.* FRANK NADEAU.
(Docket No. 1238)

MAYNARD STUART, PRO AMI *vs.* FRANK NADEAU
(Docket No. 1239)

Somerset. Opinion, January 10, 1940.

EVIDENCE. MOTOR VEHICLES.

Statements made by plaintiff and defendant to state highway officer that they were drivers of the two vehicles involved is admissible in the light of provisions of R. S. 1930, *Chap.* 29, *Sec.* 128, *as the statements were not in writing but were made to officer while preliminary investigation was being made as to cause of accident.*

On exceptions and general motions for new trials. Actions arising out of collision between a truck and an automobile. Cases tried before jury. Verdicts for the plaintiffs. Defendant filed exceptions and general motions for new trials. Exceptions overruled. Motions for new trials denied. Cases fully appear in the opinion.

Clayton E. Eames, for plaintiffs.

William H. Nichoff, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. On defendant's exceptions and general motions for new trials in cases tried together.

Although the bill embraces three exceptions, only one is pressed. It concerns the admission of testimony of a state traffic officer relating to what the defendant told him as to who was the driver of his truck at the time of the accident. Question: "What occurred when you first got there?" Answer: "I got out of the car and walked over towards the people that were walking in the road and standing in the road; they started to walk towards me and I asked who the

drivers was of the two vehicles. Mr. Nadeau—." Then followed colloquy and other testimony, but later, having the original question read by the reporter, the Court said: "You may finish your answer." Continued the witness: "I asked who the drivers was. Mr. Nadeau and Mr. Lawyerson both stated that they were the drivers of the two vehicles."

Defendant's counsel bases his objection to the admissibility of this testimony on Section 128 of Chapter 29, R. S. 1930, which reads as follows:

"(a) The chief of the state highway police shall prepare and shall on request supply to police and sheriff's offices and other suitable agencies forms of accident reports calling for sufficiently detailed information to disclose with reference to a highway accident the cause, conditions then existing and the persons and vehicles involved.

"(b) The chief of the state highway police shall receive accident reports required to be made by law and shall tabulate and analyze such reports and may publish annually or at more frequent intervals statistical information based thereon as to the number, cause and location of highway accidents.

"(c) The driver of any vehicle involved in an accident resulting in injuries or death to any person or property damage to an apparent extent of fifty dollars or more shall, immediately forward a report of such accident to the chief of the state highway police or forthwith deliver the same to some state highway police officer, who shall so forward the same to said chief. The chief may require drivers, involved in accidents, to file supplemental reports of accidents upon forms furnished by him whenever the original report is insufficient in the opinion of the chief. Such reports shall be without prejudice, and the fact that such reports have been so made shall be admissible in evidence solely to prove a compliance with this section, but no such report or any part thereof or statement contained therein shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of such accident."

Without question the reports thereby required are written. One making a verbal report could not well "forward" or "file" it. The statutory provision for preparation of "forms" also is significant.

Here no report in writing either was or was then about to be made by the witness. The inquiry made by the officer immediately upon his arrival was addressed to a group for the purpose of learning who participated in the accident. It was preliminary to investigation as to the cause of the accident. The two Connecticut cases cited by defendant's counsel (*Ezzo* v. *Geremiah*, 107 Conn., 670, 142 A., 461, and *Voegeli* v. *Waterbury Yellow Cab Co.*, 111 Conn., 407, 150 A., 303) are clearly distinguishable. They involved written reports. The statute being inapplicable, the defendant takes nothing under this exception.

Should new trials be granted under the defendant's general motions? We think not. Factual questions were decided by the jury. A study of the record reveals no manifest error. Concededly there was evidence tending to sustain contentions of the defendant had it been accepted as true. The jury had to ascertain the actual facts, weighing probabilities and passing upon the veracity of the witnesses. It found that the plaintiffs had sustained their contentions by a fair preponderance of the evidence. The jury could and no doubt did find that the defendant (himself the driver of his truck and then in some state of intoxication) negligently drove it, as it approached the oncoming car of plaintiff Lawyerson, first to the right and then across the road to the left until it collided with Lawyerson's car on its own side of the road, practically up against the fence.

While there was an issue of fact as to who was driving at the time of the accident, the jury found that the defendant was the then driver. It accepted as true his statement to that effect as against a contra inference that might have been drawn from the fact, if believed, that sometime prior to the accident one Kelley had been driving. The jury found that the defendant told the truth to the officer rather than when he testified at the trial.

Exceptions overruled.
Motions for new trials denied.

(DUNN, C. J., having deceased, did not join in this opinion.)

LLOYD W. TOZIER, COLL. *vs.* GEORGE L. WOODWORTH AND LAND.

LLOYD W. TOZIER, COLL. *vs.* MADELINE P. WOODWORTH AND LAND.

LLOYD W. TOZIER, COLL. *vs.* MINNIE McL. WOODWORTH AND LAND.

LLOYD W. TOZIER, COLL. *vs.* MINNIE McL. WOODWORTH AND LAND.

LLOYD W. TOZIER, COLL. *vs.* GEORGE L. WOODWORTH AND LAND.

LLOYD W. TOZIER, COLL. *vs.* GEORGE L. WOODWORTH AND LAND.

Waldo. Opinion, January 16, 1940.

TAXATION. TOWNS. EVIDENCE.

The proper way to review errors of law in a case heard and determined by the court without the aid of jury is, if at all, by exceptions.

A return by the person directed in a warrant for a town meeting to warn and notify the qualified voters to assemble at the time and place appointed is required by R. S., Chap. 5, Sec. 7, and is essential to the validity of the meeting and the only proper evidence of its legality.

If errors or omissions exist in the return, it may be amended according to fact by the officer whose duty it was to make it correctly. But the amendment must be under oath.

Overvaluation by reason of undervaluation of the properties of other taxpayers is not a defense to an action for taxes.

Valuation book of assessors was not rendered incompetent as evidence by immaterial omissions.

Exceptions lie only to errors of law.

On motions and exceptions. Actions brought under R. S., Chap. 14, Sec. 28, to enforce alleged liens for taxes assessed in 1937 by the assessors upon interests in real estate. Cases tried before presiding Justice with jury waived. Justice found plaintiff entitled to judgment both as against the defendants and the real estate attached. Defendants filed motions for new trials and exceptions. Motions dis-

missed this docket to be dismissed below. Exceptions overruled. Cases fully appear in the opinion.

Francis W. Sullivan, for plaintiff.

Paul L. Woodworth, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. These six cases were tried together before the Justice presiding at a term of the Superior Court with jury waived. By agreement of counsel, they were presented as one case and argued together.

The actions were brought under R. S., Chap. 14, Sec. 28, to enforce alleged liens for taxes assessed in 1937 by the Assessors of the Town of Unity upon interests in real estate there situate and accurately described in the respective assessments. The assessors had jurisdiction to so assess, and the defendants were severally assessable. In each case, the justice found the plaintiff entitled to judgment both as against the defendant and the real estate attached, in the amounts sued for and with costs.

The cases come forward on motions by the defendants to set the decisions aside, and on exceptions. The motions can not be considered. The proper way to review errors of law in a case heard and determined by the court without the aid of jury is, if at all, by exceptions. *Thompson* v. *Thompson*, 79 Me., 286, 291, 9 A., 888; *Heim* v. *Coleman*, 125 Me., 478, 135 A., 33.

The first exceptions relate to the admission in evidence of the warrant for the town meeting at which the assessors were chosen, which was offered as proof of the due election of these officers. Objection was made that the return of the person to whom the warrant was directed was legally insufficient. The original warrant with the return thereon is brought forward with the record. It shows on its back a return written in ink, corrected in ink as to date of posting, interlined, and modified as to punctuation in pencil and attested by a competent officer. This return was stricken out by lines in ink and below is a new return, complete in substance and proper in form, signed by the same officer. No jurat is attached.

A return by the person directed in a warrant for a town meeting

to warn and notify the qualified voters to assemble at the time and place appointed is required by statute. R. S., Chap. 5, Sec. 7. The return is essential to the validity of the meeting and the only proper evidence of its legality. *Blaisdell* v. *Inhabitants of Town of York*, 110 Me., 510, 515, 87 A., 361; *Auburn* v. *Water Power Co.*, 90 Me., 71, 78, 37 A., 335. If errors or omissions exist in the return, it may be amended according to fact by the officer whose duty it was to make it correctly. But the amendment must be under oath. R. S., Chap. 5, Sec. 10; *Blaisdell* v. *Inhabitants of Town of York*, supra. It is argued on the brief that the last return on the warrant under examination is an amended return, not under oath and invalid on its face. This contention can not be sustained. There is no evidence that the officer did anything more than rewrite his official return while he originally had the warrant. The Court is of the opinion that the return as required by the statute is upon the warrant.

The next exceptions are to the admission of the assessors' valuation book in evidence "for that large classes of property were omitted therefrom." These exceptions must also fail. Had the evidence tended to establish, which it does not, that the assessors purposely and wilfully omitted to tax "large classes of property" liable to taxation, no defendant in these actions would be afforded tenable ground to insist that the whole levy was void, that he himself was not subject to be assessed, or that he was assessed for more property than he was liable for. Overvaluation by reason of undervaluation of the properties of other taxpayers is not a defense to an action for taxes. *Dover* v. *Water Co.*, 90 Me., 180, 38 A., 101; *Greenville* v. *Blair*, 104 Me., 444, 72 A., 177; *Bucksport* v. *Swazey*, 132 Me., 36, 165 A., 164. The valuation book of the Assessors of Unity was not rendered incompetent as evidence by immaterial omissions.

The final exceptions which are to the findings and judgments of the presiding Justice are without merit. The rules of law governing the cases were properly applied and the findings of fact were supported by credible evidence. Exceptions lie only to errors of law.

In each case, the entry is

Motion dismissed this docket to be dismissed below.
Exceptions overruled.

(DUNN, C. J., having deceased, did not join in this opinion.)

CURTIS G. ESTABROOK *vs.* FORD MOTOR COMPANY.

Penobscot. Opinion, January 23, 1940

PLEADING AND PRACTICE. CORPORATIONS.

A plea in abatement attacks the writ and not the declaration. It does not reach the merits of the case, but rather sets forth a reason why the defendant is not required to plead to the merits. Because of this it is not favored by the court, and it is held that there must be an exact compliance with every requirement of statute or rule, whether of form or substance, or the plea will be overruled on a demurrer.

Motion of defendant, though filed within the time required by the rule, was insufficient as a plea in abatement because it did not conclude with "praying judgment of the writ."

A motion to dismiss reaches only a defect which is apparent on the face of the record.

A defendant, attempting to call court's attention to matter outside record by motion to dismiss action because of defective service of writ, does not lose right to dismissal thereof for defect apparent on inspection of record, as party is barred from taking advantage of defective service only by procedure constituting waiver thereof.

The entry of general appearance and filing of plea to merits by defendant after overruling of plea in abatement or other dilatory plea, filed in accordance with court rule requiring that pleas in abatement or to jurisdiction be filed within two days after entry of action and that they be verified by affidavit, if alleging facts not apparent on face of record, will not constitute waiver of defects in service of writ.

If defendant does not answer over after overruling of plea in abatement or other dilatory plea and no want of jurisdiction is apparent on inspection of record, a default may be entered.

A defendant must file a dilatory plea within the first two days of the return term and if he does not do so he automatically waives the right to bring to the attention of the court matters dehors *the record which could be shown under a strict plea in abatement.*

The failure to file a dilatory plea will not cure defects apparent on the face of the record which go to the jurisdiction.

When no jurisdiction is obtained over a defendant corporation it is under no obligation to answer at all.

The failure of a defendant to call the attention of the court to a defective service, apparent on the face of the record, does not constitute a waiver and it becomes the duty of the court on its own initiative to dismiss the action and to refuse a default. Defendant in an appropriate manner may at any time after entry of the writ call the attention of the court to its duty in this respect without being held to have waived the defect, but a general appearance or a plea to the merits will waive the defect unless the motion is filed in accordance with the rule.

A foreign corporation's motion to stay further proceedings in action against it for want of proper and sufficient service of writ served to call court's attention to defective return, failing to show that company served as defendant's agent was domestic corporation, though unavailing to bring court's attention to point that such company was not defendant's agent, and such return being defective on its face, it was court's duty to dismiss action.

Action in which plaintiff seeks to recover damages for the alleged negligence of defendant. Defendant filed motion attacking jurisdiction. Plaintiff demurred to pleading. Demurrer overruled and case dismissed. Plaintiff filed exceptions. Exceptions overruled. Case fully appears in the opinion.

Stern and Stern, for plaintiff.

James E. Mitchell, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. This is an action in which the plaintiff seeks to recover damages for the alleged negligence of the defendant. The defendant is described in the writ as "Ford Motor Company, of Detroit, Michigan, a corporation duly existing and having a place of business and doing business within this state, at Bangor, in said County of Penobscot." It is apparent from the pleadings and is conceded in argument that the defendant is to be treated as a foreign corporation doing business within this state.

In accordance with the provisions of R. S. 1930, Chap. 95, Sec. 19, service on such a corporation shall be made by leaving an attested copy of the writ, "with the president, clerk, cashier, treasurer, agent, director or attorney of such company or corporation,

or by leaving such copy at the office or place of business of such company or corporation within this state; and in each case, it shall be so served fourteen days at least before the return day thereof."

The officer's return of service of the writ reads as follows:

"STATE OF MAINE

PENOBSCOT, ss September 22d, A. D. 1938.

By virtue of this writ, I this day attached a chip, the property of the within named defendant, and summoned it, FORD MOTOR COMPANY, by leaving an attested copy of this writ with its agent, Webber Motor Co., at the office and place of business of said Ford Motor Company within this state, by delivering to its said agent, Webber Motor Co., through delivery to Alburney E. Webber, treasurer of said Webber Motor Co., the said attested copy of this writ; and also written notice that trial at the return term is demanded by plaintiff.

Maurice L. Rosen

Deputy Sheriff"

The defendant through its attorney appeared specially for the sole purpose of questioning the jurisdiction of the court, and on the second day of the return term filed a motion praying that the court examine into the grounds of jurisdiction, and stay any further proceedings for want of proper and sufficient service and for lack of jurisdiction in the court over the cause. The grounds on which such motion is based are that the purported service was insufficient and defective as a matter of law, and what seems to be particularly relied on is that the Webber Motor Company, on which service purports to have been made, was not the agent of the Ford Motor Company.

To this pleading the plaintiff demurred; the court overruled the demurrer, and dismissed the case for want of service. A careful analysis of the reasoning of the presiding Justice will clarify the jurisdictional problem here involved.

A plea in abatement attacks the writ and not the declaration. It does not reach the merits of the case, but rather sets forth a reason why the defendant is not required to plead to the merits. Because of

this it is not favored by the court, and it is held that there must be an exact compliance with every requirement of statute or rule, whether of form or substance, or the plea will be overruled on a demurrer. *Burnham* v. *Howard*, 31 Me., 569; *Getchell* v. *Boyd*, 44 Me., 482.

The so-called motion of the defendant in this case, though filed within the time required by the rule, was insufficient as a plea in abatement because it did not, as pointed out by the presiding Justice, conclude with "praying judgment of the writ." *Hazzard* v. *Haskell*, 27 Me., 549. Assuming that it sought to bring to the attention of the court a defect in the service of the writ based on the claim that the Webber Motor Company was not the agent of the Ford Motor Company, it was ineffectual because a motion to dismiss reaches only a defect which is apparent on the face of the record. *Chamberlain* v. *Lake*, 36 Me., 388; *Littlefield* v. *Maine Central Railroad Company*, 104 Me., 126, 71 A., 657; *Continental Jewelry Co.* v. *Minsky*, 119 Me., 475, 111 A., 801.

The presiding Justice, though holding that the motion filed by the defendant was of no avail to bring before the court the question of fact which the defendant sought to raise, ruled that it did have "office to call the court's attention to the record." And the court held that the officer's return of service was defective on its face, because it did not appear in the return that the Webber Motor Company was a corporation, and if it was a corporation, it did not appear that it was a domestic corporation.

Two questions are therefore before us for decision. First: Was the officer's return as held by the presiding Justice defective on its face? Second: If it was, did the procedure followed by the defendant constitute a waiver of such defect?

The defect in the return of service is pointed out by the presiding Justice in the following language: "Assuming, but not deciding, that, within the contemplation of this statute, a domestic corporation may be an agent in this state of a foreign corporation here doing business, yet it nowhere appears in this return that the Webber Motor Co. is a corporation, and, if it be a corporation, it does not appear that it is a domestic corporation. So far as the return goes it may be a foreign corporation. And if it was a foreign corporation its residence is in the state where is was incorporated."

As an alternative the plaintiff claims that the officer's return is

sufficient because it shows that, in accordance with the provisions of R. S. 1930, Chap. 95, Sec. 19, the copy was left "at the office or place of business of" the defendant "within this state." But the officer's return does not so recite. It states specifically that the copy was left with the Webber Motor Company by delivery of it to Alburney E. Webber, the treasurer. The fact that the Webber Motor Company may have been located at the office and place of business of the Ford Motor Company is immaterial.

The ruling of the presiding Justice, that the service as shown by the officer's return was defective was correct. Did the defendant waive such defective service? The answer to this question brings us to a consideration of Rule V of the Supreme Judicial and Superior Courts, 129 Me., 505, about which there seems to be considerable confusion in the mind of counsel.

The rule reads as follows:

"Pleas and Motions in Abatement

> Pleas or motions in abatement, or to the jurisdiction, in actions originally brought in this court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if alleging matter of fact not apparent on the face of the record, shall be verified by affidavit."

The plaintiff appears to argue that because the defendant attempted by a motion to dismiss to call to the attention of the court a matter outside the record, it thereby lost the right to have the action dismissed for a defect which was apparent on inspection of the record. Such is not the law. Only by a procedure which would constitute a waiver of the defective service is a party barred from taking advantage of it.

Rule V must be read in connection with R. S. 1930, Chap. 96, Sec. 37, and Chap. 91, Sec. 28. From these provisions it appears that on the overruling of a plea in abatement or other dilatory plea a defendant has the right to answer over on the merits if he so desires. On doing so he may proceed to trial and at the close bring forward to the Law Court his exceptions to the overruling of the plea. The entry of a general appearance and the filing of a plea to the merits will not constitute a waiver of defects provided the dilatory plea is

filed in accordance with the rule. *Maine Bank* v. *Hervey*, 21 Me., 38; *Stowell* v. *Hooper*, 121 Me., 152, 116 A., 256; *Klopot* v. *Scuik*, 131 Me., 499, 162 A., 782. If the defendant does not answer over and there is no want of jurisdiction apparent on inspection of the record, a default may be entered. *Jordan* v. *McKay*, 132 Me., 55, 165 A., 902. The object of Rule V is to require a defendant to file his dilatory plea within the first two days of the return term. If he does not do so, he automatically waives the right to bring to the attention of the court matters *dehors* the record which could be shown under a strict plea in abatement. On the other hand the failure to do so will not cure defects apparent on the face of the record which go to the jurisdiction. Let us take for example the present case in which the officer's return shows a defective service. As no jurisdiction was obtained over the defendant corporation it was under no obligation to answer at all. *Dow* v. *March*, 80 Me., 408, 15 A., 26.

The question before us therefore is whether the entry of a special appearance to object to the jurisdiction, together with the filing of the so-called motion which sought without avail to raise matters outside the record, was a waiver of the defective service apparent from an inspection of the officer's return.

There is language in some cases which taken by itself might suggest that, even though a defect in service of a writ is apparent from inspection of the record, an objection thereto avails only when made within the time prescribed by the rule. Such unqualified statement is inconsistent with the decision in *Dow* v. *March*, supra, and with *Mace* v. *Woodward*, 38 Me., 426, both of which state the law correctly. Such general language, when used in *Trafton* v. *Rogers*, 13 Me., 315, 320; *Cook* v. *Lothrop*, 18 Me., 260, 261; *Snell* v. *Snell*, 40 Me., 307; *Shaw* v. *Usher*, 41 Me., 102, 103, is readily explainable when the procedure followed in each of these cases is considered. In none of them was the motion made within the time prescribed by the rule, and there was in each either a general appearance, or a plea to the merits and a trial. In each instance it was very properly held that in view of such procedure there was a waiver of the defect. In *Richardson* v. *Rich*, 66 Me., 249, there was a defective service and a motion to dismiss filed on the tenth day of the term. The presiding Justice sustained this motion and an exception to such ruling was sustained. It is not altogether clear on just what ground the opinion

is based. Apparently the court proceeded on the theory that the defect was not apparent on the face of the record, for the opinion says, page 253: "It is undoubtedly true, as contended in the argument, that where the judgment would be erroneous the court will abate the action either with or without motion; and this it will do in any stage of the proceedings, if on inspection, it becomes apparent that there is a want of jurisdiction." In *Mace* v. *Woodward*, supra, a special appearance was filed in order to present a motion to the court to dismiss the action for want of legal service. The court held that the motion should be sustained even though not filed within the time required by the rule, and the limitation on the scope of the rule is well stated in the following language, page 427: "The motion in this case was too late by the rule, and could not avail, if the action could proceed, provided none had been made." In other words, the defendant had the right provided no general appearance or plea to the merits had been entered, at any time to ask a dismissal of the action, if it was beyond the power of the court to enter a default.

The failure of a defendant to call the attention of the court to a defective service apparent on the face of the record does not constitute a waiver and it becomes the duty of the court on its own initiative to dismiss the action and to refuse to enter a default. Such is the reasoning of *Dow* v. *March*, supra. And it must inevitably follow that the defendant in an appropriate manner may at any time after entry of the writ call the attention of the court to its duty in this respect without being held to have waived the defect. This is the decision in *Mace* v. *Woodward*, supra. The limitation is that a general appearance or a plea to the merits will waive the defect unless the motion is filed in accordance with the rule.

Although the motion in this case was unavailing to bring to the attention of the court the particular matter sought to be raised by the defendant — namely that the Webber Motor Company was not the agent of the Ford Motor Company — yet the motion did as the court well said serve to call the attention of the court to the return of service. The return being defective on its face, it was the duty of the court to dismiss the action.

One other suggestion made in argument needs to be considered. The plaintiff claims that the court below should have permitted an amendment of the officer's return. The conclusive answer to such

contention is that the plaintiff made no request of the presiding Justice for such amendment, but on the contrary preferred to rest his case on the sufficiency of such return.

The case of *Abbott* v. *Abbott*, 101 Me., 343, 64 A., 615, 617, is cited by the plaintiff to support his contention that an amendment of such return is now possible, presumably by this Court sustaining his exception and sending the case back to the Superior Court. But the case cited, not only is not authority for such a procedure, but supports the ruling of the presiding Justice in the present case in dismissing this action. A consideration of this case is illuminating. The defendant was described in the writ as a resident of Camden in the County of Knox. Real estate was attached but service was not made on the defendant, because at the time when service should have been made he could not be found and had no last and usual place of abode within the jurisdiction. At a subsequent term, on these facts being brought to the attention of the court, an order was made for a new service on the defendant. At the term at which this new service was returnable the defendant filed a motion to dismiss on the ground that the order required a service in hand whereas the officer's return showed a substituted service by leaving the summons at the defendant's last and usual place of abode. The motion to dismiss was overruled and the defendant excepted. The Law Court held that the ruling of the presiding Justice on the issue presented to him was correct, but it was brought to the attention of the Law Court that there was an inadvertent omission in the officer's return in that he stated that he left "at the last and usual place of abode a new summons" but neglected to state that it was at the "defendant's" last and usual place of abode. "On this ground alone" the Court said the exceptions must be sustained. These were the defendant's exceptions and not as in the case before us the plaintiff's exceptions. The Court then very properly called attention to the fact that as the case had to go back to the Trial Court, that court could, if the facts justified it, allow an amendment of the officer's return. The case was not sent back for that purpose but because the Law Court found on the face of the record a defect in service hitherto undiscovered. This is substantially the case before us except that there the defect was discovered in argument before the Law Court, in the instant case it was found by the presiding Justice. The final sentence of that opinion is

full justification for the action taken by the presiding Justice in this case. The Court said, page 348: "If the return is not amended the motion to dismiss must be sustained, unless further service of the writ shall be ordered."

We have in the instant case a return defective on its face, no motion to amend by the defendant but rather a reliance on the sufficiency of the return, a ruling by the presiding Justice dismissing the case for want of service, and exceptions to such ruling which must be overruled.

Exceptions overruled.

(DUNN, C. J., having deceased, did not join in this opinion.)

STATE OF MAINE

Penobscot, ss. Supreme Judicial Court
Law Term, June, 1939.

JUNE E. ESTABROOK *vs.* FORD MOTOR COMPANY.

THAXTER, J. This is a companion case to *Curtis G. Estabrook* v. *Ford Motor Company* decided this day. As the issue in each case is identical, the entry will be the same.

Exceptions overruled.

ENOCH C. RICHARDS COMPANY

vs.

HARRY C. LIBBY, IN HIS CAPACITY AS THE DULY APPOINTED EXECUTOR OF THE LAST WILL AND TESTAMENT OF JULIA E. HODSDON, DECEASED.

Cumberland. Opinion, January 23, 1940.

LANDLORD AND TENANT.

Findings of fact by the justice hearing the case are conclusive if there is any evidence to support them.

Exceptions will lie to correct error of law.

During the existence of a tenacy the landlord may collect rent in full regardless of actual occupancy of the premises by the tenant.

Where there is a wrongful abandonment of premises by a tenant and a refusal to pay rent, the landlord may at his election permit them to remain vacant, refuse to recognize the attempted surrender by the tenant, and bring suit to collect the rent as it comes due. The tenant can not by such action cast a burden on the landlord to find someone to take his place.

The relationship of landlord and tenant may be terminated by the acts of the parties.

When a lessee does the acts which prove his intention to abandon and surrender, like vacating the premises and giving up the key, and the lessor in pursuance of such acts, goes into actual occupation, then, by acts and operation of law, the lease is terminated.

Action for the recovery of rent. Case tried before a justice of the Superior Court without intervention of jury with right to except reserved. Judgment for plaintiff. Defendant files exceptions. Exceptions sustained. Case fully appears in the opinion.

Philip A. Hanson, for plaintiff.

Harry C. Libby, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. This action brought against the executor of the estate of Julia E. Hodsdon was tried before a justice of the Superior Court without the intervention of a jury. The right to except was reserved.

The plaintiff seeks to recover the sum of $400.00 for rent of an apartment for a period of eight months from April 16, 1937 to December 15, 1937, at $50.00 per month. There are also items in the account amounting to $8.65 for gas and electricity furnished and for damage done to the apartment. The presiding Justice found that judgment should be entered for the plaintiff for $403.65. The case is before this Court on ten exceptions of the defendant, some of which are to certain findings made by the court, others to the refusal of requests for rulings. All of the exceptions are without merit but one which we shall consider. There is no dispute as to the facts.

The plaintiff owned and operated an apartment house located at 419 Cumberland Avenue in Portland. The defendant's testatrix through her agent entered into negotiations to rent an apartment in this building. The one which she wanted No. 51 was occupied but was soon to become vacant. Until it should be available it was agreed orally that the prospective tenant might occupy apartment No. 2 at a rental of $50.00 per month. On May 15, when the other apartment became available, the tenant vacated apartment No. 2 without notice and left the building for good. The presiding Justice found that "the occupancy of apartment No. 2 was upon a verbal agreement for an indefinite period upon a monthly payment of rent;" and "that it was a tenancy at will and could be terminated only by the statutory notice or by mutual consent." This was a correct description of the relationship of the parties. When the tenant went the key appears to have been left on the office desk and was taken by Mrs. Richards, the agent in charge of the building with whom all the negotiations had taken place. There is no doubt that Mrs. Richards knew when Mrs. Hodsdon left that she intended to give up the apartment. Mrs. Richards used the key to enter the apartment, which she cleaned and put into condition for a new tenant; and from time to time she showed it to prospective tenants. Apartment No. 51 was

rented in October and apartment No. 2 December 1. The plaintiff seeks to recover rent for apartment No. 2 from April 16 to December 15.

The ruling to which the defendant takes exception is as follows in the words of the presiding Justice:

"At the termination of the occupancy by the defendant's deceased on May 14th the key of apartment No. 2 was left at the plaintiff's office in the building where the apartments were located. The plaintiff used the key to enter and put the apartment into condition for a new tenant, and showed the apartment to prospective tenants. It was let to a new tenant on December 1st.

"I find that the plaintiff did not exercise dominion over the premises when it endeavored to obtain a new tenant, except as was reasonable and necessary to prevent damages from accumulating."

This ruling we think was error. We are aware of the well settled principle that findings of fact by the justice hearing the case are conclusive if there is any evidence to support them. In the case before us, however, the facts are not in dispute and the only inference which can be drawn from them does not in our opinion support the ruling below. Under such circumstances there is error in law to correct which exceptions will lie. *Chabot & Richard Company* v. *Chabot*, 109 Me., 403, 84 A., 892.

The ruling that the landlord did not, by taking the key, by entering the apartment, and by offering it to prospective tenants, accept the surrender of it by the defendant's testatrix is based on no facts or inferences therefrom in the evidence but rather on the assumption of law that such acts were "necessary to prevent damages from accumulating." So long, however, as a tenancy exists the landlord may collect rent in full regardless of actual occupancy of the premises by the tenant. *Withers* v. *Larrabee*, 48 Me., 570; *Rollins* v. *Moody*, 72 Me., 135. Such being the case it must follow that, where there is a wrongful abandonment of premises by a tenant and a refusal to pay rent, the landlord may at his election permit them to remain vacant, refuse to recognize the attempted surrender by the tenant, and bring suit to collect the rent as it comes due. The tenant can not by such action cast a burden on the landlord to find someone to take his place. Such is the overwhelming weight of authority. *The Boardman Realty Co.* v. *Carlin*, 82 Conn., 413, 74 A., 682; *Pat-*

terson v. *Emerich*, 21 Ind. App., 614, 52 N. E., 1012; *Haycock* v. *Johnston*, 81 Minn., 49, 83 N. W., 494; *Muller* v. *Beck*, 94 N. J. L., 311, 110 A., 831; *Underhill* v. *Collins*, 132 N. Y., 269, 30 N. E., 576; *Goldman* v. *Broyles* (1911 Tex. Civ. App.), 141 S. W., 283; 14 Ann. Cas. 1088 Note; 40 A. L. R., 190 Note; McAdam on Landlord and Tenant, 5 ed. p. 1375.

The acts of the landlord can not, therefore, be explained on the theory that there was any obligation on its part to mitigate damages, and there is no evidence to indicate that the landlord claimed to be acting for the tenant. The question, therefore, is whether the acts of the parties constituted a termination of the tenancy by operation of law.

There is no doubt that the relationship of landlord and tenant may be terminated by the acts of the parties. *Hesseltine* v. *Seavey*, 16 Me., 212; *McCann* v. *Bass*, 117 Me., 548, 105 A., 130; *Talbot* v. *Whipple*, 14 Allen, 177; *Phene* v. *Popplewell*, 12 C. B. R. N. S., 334; *Dodd* v. *Acklom*, 6 Mann. & G. 672. In two of these cases the facts are very similar to those now before us.

The facts in *McCann* v. *Bass*, supra, are that the defendant leased a store to the plaintiff. Before the termination of the lease the plaintiff vacated the premises for business purposes, returned the key to the defendant and moved to another store. The defendant took control of the store against the will of the plaintiff, remodelled it, let part of it to a tenant and occupied part himself. The Court held in an action brought by the tenant for an eviction that the lease had been terminated by operation of law. The Court said, 117 Me., at page 550, 105 A., at page 131: "That is, when the lessee does the acts which prove his intention to abandon and surrender, like vacating the premises and giving up the key, and the lessor in pursuance of such acts, goes into actual occupation, then, by acts and operation of law, the lease is terminated."

In *Talbot* v. *Whipple*, supra, one Carroll, a tenant at will of the defendant of certain land, had placed thereon a building in which he had installed machinery. In determining the title to this property the Court found it necessary to decide whether the tenancy of Carroll in the real estate had been terminated. The statement of facts shows that Carroll became insolvent; that without paying his rent he stopped work and abandoned the premises and the equipment with the intention of not returning; that he locked the doors hang-

ing the keys inside but left one open through which the defendant entered and took possession; that no notice was ever given by either party to the other that the tenancy was to end. In holding that the tenancy had terminated the Court said, page 188: "The facts in the present case are of the most unequivocal character on the part of both landlord and tenant, and leave no room for doubt as to the intent of the parties."

In the case before us it is apparent from the testimony of both Mrs. Stewart, who acted as Mrs. Hodsdon's agent, and of Mrs. Richards, the manager and agent of the plaintiff, that Mrs. Richards knew that Mrs. Hodsdon, when she left, intended to give up apartment No. 2. There were complaints between the parties. Mrs. Richards said that apartment No. 51 was ready, Mrs. Stewart replied that they weren't going to take it. Mrs. Richards then found fault because she had not been given a month's notice; but at the same time gave no intimation that she intended to hold Mrs. Hodsdon as a tenant. The key was left on the office desk. Mrs. Richards took the key, entered the apartment, cleaned it, made it ready for a new tenant and showed it to prospective tenants from time to time. Her conduct was unequivocal; she made no attempt to qualify it. Every act done is inconsistent with the present claim that the tenancy of Mrs. Hodsdon continued.

Most significant is the response of Mrs. Richards to a question by the court as to whether she was holding an apartment for Mrs. Hodsdon if she decided to come back.

"THE COURT: Which apartment was it you said you would hold for her.

"A. I was holding, really, either one; because in the spring of the year that is a hard time to let apartments anyway. I couldn't hold one just separately for her and not rent it if I had a chance."

This language certainly shows that Mrs. Richards claimed the right after Mrs. Hodsdon left to put a new tenant in apartment No. 2 whenever she had the chance to do so. It is utterly inconsistent with the present contention of the plaintiff that Mrs. Hodsdon remained a tenant of that apartment during the succeeding months with the right to be given thirty days' notice before her tenancy could be terminated.

Exceptions sustained.

(DUNN, C. J., having deceased, did not join in this opinion.)

ELLEN V. MURPHY

vs.

FEDERAL LAND BANK OF SPRINGFIELD ET AL.

Aroostook. Opinion, February 7, 1940.

STATUTE OF FRAUDS. SPECIFIC PERFORMANCE.

Tenant's removal of sixty rods of fencing at expense of $25 *was not such a "substantial improvement" as would avoid effect of statute of frauds on oral option allegedly given to tenant to purchase farm worth* $21,000.

Telegrams stating that farm owners would entertain for a week a cash offer from tenant to purchase farm before accepting offer of third persons, and declining to give tenant an extension of time in which to make offer, did not show existence of binding contract for sale of farm to tenant.

Action to have specific performance decreed of an alleged contract between Ellen V. Murphy and Federal Land Bank of Springfield *et al.* Decree in equity dismissing plaintiff's bill. Plaintiff appeals. Appeal dismissed. Decree below affirmed. Case fully appears in the opinion.

Albert F. Cook,
Herschel Shaw, for plaintiff.
William H. Adams,
Pendleton & Rogers,
M. P. Roberts, for defendants.

SITTING: DUNN, C. J., STURGIS, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. This case comes up on appeal from a decree in equity dismissing the plaintiff's bill. The Federal Land Bank of Springfield obtained title to a 300-acre farm in Aroostook County by foreclosure of mortgages which it held. Hugh A. Murphy was the mortgagor. He had lived on the farm all his life, having become the owner by inheritance. It was a potato farm, and probably due to adverse conditions, Mr. Murphy had been unsuccessful and

finally lost his equity. He and his wife, the present plaintiff, were desirous of purchasing and again becoming owners of the farm when and if they became financially able to do so. The officers of the defendant bank were sympathetic in this respect and were willing to afford reasonable opportunity to effect such a purchase. When the foreclosure expired May 8, 1936, Murphy executed a crop mortgage to the bank which included in its provisions an acknowledgment that the premises had been rented to him by the bank for a period ending April 1, 1937, at a rental of $2600. On August 28 of the same year, the local representative of the bank prepared a contract of sale between the bank and the plaintiff, which provided that she was to purchase the premises for $21,000, of which sum $5000 was to be paid January 15, 1937, and $5000 March 15, 1937, when a deed would be given and a mortgage taken for the remainder of the purchase price. This contract was submitted to the bank officials in Springfield and its terms approved, subject, however, to the payment of the first installment of $5000. No delivery of the contract was authorized until such payment. No payment whatever was made, the contract of sale was not delivered, and never became effective. The following year on June 10, 1937, the rental arrangement with Hugh Murphy having terminated, a lease was made to the plaintiff, to expire March 1, 1938, at a rental of $2000. On May 7, 1938, another lease was executed between the same parties, ending March 1, 1939, and at the same rental. In both of the leases to the plaintiff there was a provision reserving the right to the lessor to sell the premises to another, in which event the lease terminated.

On December 27, 1938, the bank made a contract for sale to Peterson and Burke, who were made parties defendant to the plaintiff's bill. Under this contract, the prospective purchasers were to pay $21,000 upon terms which included the payment of $1000 in cash and $4000 not later than February 1, 1939.

The plaintiff alleges that the bank entered into a contract with her under its lease of June 10, 1937, giving her the right to purchase the premises the following spring upon the terms and conditions which were set out in the proposed contract of August 28, 1936; that the plaintiff, being unable to purchase the property in the spring of 1938, the bank again leased the premises to her and made the same agreement with reference to the right to purchase the

premises in the spring of 1939; further, alleges the plaintiff, the bank agreed with her that if, during the term of the lease dated May 7, 1938, it should receive an acceptable offer of purchase of the premises from any other person, the plaintiff should have the option to meet such offer within ten days after written notice was mailed to the plaintiff by the bank.

There are no allegations in the bill as to whether these agreements were made orally or in writing, but there are further averments that the plaintiff, relying upon her right to purchase, expended large sums of money and furnished labor in the betterment of the premises.

The plaintiff then alleges that the contract of sale with Peterson and Burke was a violation of the rights of the plaintiff; that she was not informed of the negotiations, but upon learning thereof, offered to meet the terms of the Peterson and Burke proposal.

The plaintiff sought through the prayers in her bill to have specific performance decreed of the alleged contract of sale to her.

Many legal issues are raised by the parties but it appears that none are necessary of decision. The presiding Justice made no findings or rulings except the final decree that, "The bill is found to be without merit." There was ample justification for such decree upon the facts disclosed by the record. The proposed contract of sale of August 28, 1936, by the frank admission of the plaintiff, never became operative or effectual. The lease to her of June 10, 1937, contains no provision for an option to purchase. On the back of this lease are printed questions to be answered by the lessee to aid the bank in its decision as to approval of the lease. One of the questions is: "Why are you leasing this farm?" The answer given is: "She hopes she will be able to buy." In the lease of May 7, 1938, appears the same question with the answer: "Wants chance to buy if financially able next spring." Mr. Murphy testified that, as to the 1937 lease, the local representative asked these questions and that the answers were given by him and written in by the representative, and that Mrs. Murphy was present. Again, as to the 1938 lease, Mr. Murphy says that he gave the answer which was written in to the same question.

The plaintiff testified that, as to the 1937 lease she understood she was to have an option to buy in the spring of 1938 if financially able. No negotiations for purchase were initiated by her. As to the 1938

lease, she was asked: "Do you recall the spring of 1938, the time you were there with your husband and Mr. Glew; whether or not there was anything said with reference to a contract to buy the property back next spring?" Answer: "No, I can't say I do." Incidentally, it appears that the 1937 rental was not paid in full and nothing was paid on the 1938 rental.

It is true that the local agents of the bank acknowledge that they suggested to Mr. Murphy at different times that he should get busy if he desired to purchase the property, but denied ever having entered into any oral agreement with either Mr. or Mrs. Murphy whereby either of them would have a right to purchase the farm.

Referring to the evidence as to substantial improvements, the period must in any event be limited to occupancy subsequent to the execution of the 1938 lease. The plaintiff did not exercise any claimed option under preceding arrangements. There being no provision for option in the 1938 lease, she asserts that such a right was granted orally. To avoid the effect of the statute of frauds, she asserts sufficient part performance by expenditures of value upon the farm. Assuming an oral agreement, with consideration, examination of the record discloses that in the summer of 1938, sixty rods of fencing were removed at an expense of $25, thus clearing some land for the purpose of planting potatoes. This slight and insignificant expenditure, incidental to the beneficial use of the premises by the tenant of a farm worth $21,000, could not support a finding of substantial improvements made in reliance upon an oral agreement as to the purchase of the property. It is also urged by the plaintiff that the defendant bank recognized the right to purchase on the part of Mrs. Murphy after it had entered into the contract of sale with Peterson and Burke, and that this appears from telegraphic communications between the parties. Instead, it is clear that when Mr. Murphy learned of the Peterson and Burke transaction, he caused a telegram to be sent, asking whether the bank would be willing to give him an opportunity to purchase the farm "providing signers of present contract keep offer open." On December 31, 1938, the bank replied by telegram, stating that if the signers of the contract kept their offer open, the bank was "willing to entertain from Murphy the best *cash* offer he cares to make between now and noon of January 7, 1939." Mr. Murphy then caused another tele-

gram to be sent, offering the same total price but installment payments of a much lesser amount and stating that, if given 30 days extension, he had good prospects of increasing the amount of the down payment. The bank replied, declining to make any extension but expressing willingness to entertain a cash offer if made without delay. On January 9, after the time limit set by the bank had expired, a telegram was sent, stating that the bank had accepted the Peterson and Burke offer. This falls far short of a recognition of a binding contract between the bank and the plaintiff, and is indicative only of a willingness to afford her an opportunity to purchase, provided it did not jeopardize the prospective sale to Peterson and Burke.

The presiding Justice was entirely justified from the record in reaching the conclusion that there was never any existing contract, either written or oral, between the defendant bank and the plaintiff for the sale of the property to her; that there was no fraud or mistake in the legal meaning of those terms, and that the bank was under no obligation to convey the premises to her.

Appeal dismissed.
Decree below affirmed.

(DUNN, C. J., having deceased, did not join in this opinion.)

MARY E. BECHARD, ADMINISTRATRIX *vs.* MAURICE LAKE.

Kennebec. Opinion, February 9, 1940.

MOTOR VEHICLES. DEATH. EVIDENCE.

Under R. S., Chap. 96, Sec. 50, the person for whose death action is brought is presumed to have been in the exercise of due care at the time of all acts in any way related to his death, and if contributory negligence be relied upon as a defense, it must be pleaded and proved by the defendant.

It is incumbent upon the plaintiff to prove negligence on the part of the defendant. If such negligence is proved, it is incumbent upon the defendant, if he would avoid liability, to prove contributory negligence on the part of the plaintiff's intestate as a proximate cause of the injury. This shifting of the burden of

proof works no change in the underlying principles of law. If the plaintiff's intestate's own want of ordinary care is proved to have been contributory to his death, plaintiff can not prevail.

Unless proven specific acts constitute negligence as a matter of law, then the fundamental rule of due care has application and decision must depend upon the factual situation presented in a given case, and unless conclusion of the jury is so manifestly contrary to the law and the evidence that it clearly could not be reached by reasoning minds, that conclusion must stand.

Where there were no exceptions to the charge of the presiding Justice the premise is therefore established that the jury was properly instructed as to the rules of law applicable.

The underlying and basic rule by which the conduct of the plaintiff's intestate must be determined is whether the facts showed a want of the care which ordinarily prudent men would use under like circumstances.

Foot passengers, in crossing a street, must make such use of their senses as the situation demands. They can not move blindly on, oblivious to everything about them.

When it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict.

Action by administratrix brought under the death-liability statute. Case tried before jury. Verdict for defendant. Plaintiff filed motion for new trial. Motion for new trial overruled. Case fully appears in the opinion.

F. Harold Dubord, for plaintiff.

Perkins & Weeks, for defendant.

SITTING: BARNES, C. J., STURGIS, THAXTER, HUDSON, MANSER, JJ.

MANSER, J. On plaintiff's motion for new trial. Plaintiff's intestate, Eugene E. Bechard, while walking on the highway, was instantly killed as the result of collision with an automobile operated by the defendant. Suit was brought under the death-liability statute. Under R. S., Chap. 96, Sec. 50, the person for whose death action is brought is presumed to have been in the exercise of due care at the time of all acts in any way related to his death, and if contributory negligence be relied upon as a defense, it must be pleaded and proved

by the defendant. The defendant pleaded such contributory negligence.

It is incumbent upon the plaintiff to prove negligence on the part of the defendant. If such negligence is proved, it is incumbent upon the defendant, if he would avoid liability, to prove contributory negligence on the part of the plaintiff's intestate as a proximate cause of the injury. This shifting of the burden of proof works no change in the underlying principles of law. If the plaintiff's intestate's own want of ordinary care is proved to have been contributory to his death, plaintiff can not prevail. *Jones* v. *Manufacturing Co.*, 92 Me., 565, 43 A., 512; *Levesque* v. *Dumont*, 117 Me., 262, 103 A., 737; *Cullinan* v. *Tetrault*, 123 Me., 302, 122 A., 770; *Danforth* v. *Emmons*, 124 Me., 156, 126 A., 821; *Field* v. *Webber*, 132 Me., 236, 169 A., 732; *Ward* v. *Power & Light Co.*, 134 Me., 430, 187 A., 527.

Negligence and contributory negligence as a general rule are essentially jury questions. Ordinarily it is from a consideration of the facts and circumstances that a determination is reached as to whether the conduct of the defendant was free from negligence, or whether there was contributory negligence on the part of the plaintiff's intestate which would constitute a bar to recovery of damages. Unless proven specific acts constitute negligence as a matter of law, then the fundamental rule of due care has application and decision must depend upon the factual situation presented in a given case, and unless conclusion of the jury is so manifestly contrary to the law and the evidence that it clearly could not be reached by reasoning minds, that conclusion must stand. *Sturtevant* v. *Ouellette*, 126 Me., 558 at 560, 140 A., 368; *Dougherty* v. *R. R. Co.*, 125 Me., 160, 132 A., 209; *Shaw* v. *Bolton*, 122 Me., 232, 119 A., 801.

Summarized, the evidence in the present case showed that Eugene E. Bechard was a healthy man, 61 years of age, a long time employee of the Maine Central Railroad Co., at the time of his death a checker in the yard office at Waterville, and having occasion in the performance of his duties to go at times from his office to the railroad station, a comparatively short distance away. His hours of duty at this period were throughout the night.

The yard office and railroad station are contiguous to double or parallel tracks of the railroad, which run northeasterly and south-

westerly through the City of Waterville. These tracks cross diagonally College Avenue, a broad cement surface street. The avenue, running approximately north and south, is level and straight at the locality in question. In daylight a person standing in the vicinity of the crossing has an unobstructed view for half a mile in either direction.

The yard office is northerly of the crossing and southerly is the railroad station, across from which is the present location of Colby College. There is no sidewalk at the railroad crossing on either side of the street. For the protection of the public the railroad company maintains three signal lights, two on one side and one on the other side of the crossing and street. These are always illuminated, showing red if a train is approaching and green if not. All these signal lights are visible to a pedestrian approaching from the railroad yard.

It was upon or near this railroad crossing that the fatal accident occurred on August 25, 1938, shortly after midnight, standard time. The area was fairly well lighted, but there was a "drizzling" rain. In this connection the medical examiner testified:

"Q. What was the condition of the night when you got there?
A. It had been raining. It was very cloudy. The visibility was poor."

The only eyewitness to the accident, aside from the persons involved, was Mr. McClay, called by the plaintiff, who was an attendant of a gasoline filling station located some two hundred feet northerly of the crossing and back from the cement surface of the highway at least fifty feet. This witness was about to leave the station temporarily to obtain a lunch at a nearby restaurant. He saw the defendant drive by, going south. He started on foot in the same direction. His testimony then continues:

"A. And as I started down I see this man in front of the car. It seemed as if he had seen the car and was scared when he see it, and just seemed to freeze right there in front of it, threw up his hands, and that is all there was to it.
Q. Did you see the light of the Lake car pick up the man?
A. Yes, sir.

Q. From the time you saw the lights pick him up until the time he was hit, how much time elapsed?
A. Well, I don't believe there was any.
Q. How is that?
A. I don't think there was any.
Q. Did you hear Mr. Lake sound his horn at any time prior to the blow?
A. No, I didn't.
Q. Did you see him put on his brakes?
A. No."

This witness in direct examination estimated the speed of the car at thirty miles per hour. On cross-examination he said the defendant was driving at a moderate rate of speed. He recognized the car with its outside aerial equipment and also recognized the driver, the defendant, Lake.

The defendant's version on direct examination of the actual happening of the accident is as follows:

"A. I was proceeding down College Avenue at what I thought was a reasonable rate of speed and it seems as though from nowhere a man appeared, and that is about all there was to it. I mean I struck him before I had time to do anything about it."

and in cross-examination:

"Q. Now as I understand it, as you were coming down the street there you say all of a sudden a man appeared as if from nowhere in front of you?
A. That is right.
Q. That is, when you first saw him he was right in front of you in your pathway?
A. Yes.
Q. And there was nothing for you to do, you couldn't do anything to avoid an accident?
A. That is right."

Mr. Bechard was dressed in dark clothes. He was carrying in his hands papers spoken of as waybills. It is undisputed that he was

evidently going from the yard to the railroad station in the performance of his duties. The signal lights were green. There is no evidence of other pedestrians or of vehicular traffic on the highway at the time, except that the defendant testified he met one car going northerly in the opposite direction to himself just before he got to the crossing. According to the defendant and the witness, McClay, the defendant was travelling upon his right-hand side of the cement surface and it does not appear that his car was swerved from its course before the impact.

The medical examiner testified that the nature of the injuries was indicative of a severe blow. Practically every bone in the face and skull was fractured and there was a protruding fracture of the left leg.

No oral evidence was presented as to Mr. Bechard's actions prior to the impact.

Careful scrutiny of the testimony appears to warrant the foregoing resumé as presenting all the essential facts concerning liability which were submitted to the jury. Upon this state of facts the plaintiff argues that the verdict for the defendant was clearly wrong and requires the intervention of the Court for the reasons that:

> It must have been based on misapprehension, bias or prejudice.
>
> The negligence of the defendant was clearly shown.
>
> The defense did not sustain the burden of proof as to contributory negligence on the part of the plaintiff's intestate.
>
> The jury must have drawn inferences which were based upon mere conjecture or surmise.

Under our well-established procedure, the general verdict returned for the defendant does not disclose what conclusion, if any, was reached with reference to negligence on the part of the defendant. If decision rested upon that element alone, it might be difficult to sustain, but no opinion thereon need be expressed. Assuming such negligence, it is still essential to determine whether the jury erred in finding proof of contributory negligence on the part of the plaintiff's intestate.

There were no exceptions to the charge of the presiding Justice

and the premise is therefore established that the jury was properly instructed as to the rules of law applicable. The underlying and basic rule by which the conduct of the plaintiff's intestate must be determined is whether the facts showed a want of the care which ordinarily prudent men would use under like circumstances. Application of this general rule to specific instances and situations analogous to those at bar aids in demonstration. Foot passengers, in crossing a street, must make such use of their senses as the situation demands. They can not move blindly on, oblivious to everything about them. *Welch* v. *St. Ry.*, 116 Me., 191, 100 A., 934: "One is bound to see what is obviously to be seen." *Clancey* v. *C. C. P. & L. Co.*, 128 Me., 274, 147 A., 157; cognizance by pedestrian of duty to safeguard his person as he passes from position of safety and obscurity to open roadway and into pathway of automobile lawfully on his side of street, *Cooper* v. *Can Co.*, 130 Me., 76, 153 A., 889; *Beaucage* v. *Roak*, 130 Me., 114, 153 A., 894; "Had he looked up the street he must have seen the car approaching and had he been attentive he must have seen the lights projecting their rays by the rear of the team in season to have avoided his peril." *Levesque* v. *Dumont*, 116 Me., 25, 99 A., 719, 720.

Other illustrative cases as to the exercise of due care by pedestrians are: *Colomb* v. *P. & B. Ry.*, 100 Me., 418, 61 A., 898; *Tibbetts* v. *Dunton*, 133 Me., 128, 174 A., 453; *Whalen* v. *Mutrie*, 274 Mass., 316, 142 N. E., 45; *Schmeiske* v. *Laubin et al.* (Conn.), 145 A., 890; *Matulis* v. *Gans*, 107 Conn., 562, 141 A., 870; *Paskewicz* v. *Hickey*, 111 Conn., 219, 149 A., 671.

But the plaintiff places particular emphasis upon the contention that the defendant did not overcome the presumption of due care on the part of plaintiff's intestate at the time of all acts in any way related to his death because there was no testimony from any witness as to what he was actually doing until the moment of impact. Ergo, conclusion was reached entirely from inferences based on mere conjecture and not upon facts, contra to the rule as laid down in *Seavey* v. *Laughlin*, 98 Me., 517, 57 A., 796; *Mahan* v. *Hines*, 120 Me., 371, 115 A., 132; *Bennett* v. *Thurston*, 120 Me., 368, 114 A., 459, and cases cited in Note 33 in 95 A. L. R. 182 relating to inferences. This rule is stated in *Mahan* v. *Hines*, supra: "When it is sought to establish a case upon inferences drawn from facts, it

must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict."

With the principle thus enunciated the defendant agrees. Reply is that it is without application here. As said in *Mahan* v. *Hines*, supra: "An arbitrary rule as to the burden of proof (in death cases) does not change the common experience of mankind on which the presumptions of negligence in this class of cases are based."

The following physical facts were either not controverted, or were fairly shown: Plaintiff's intestate was walking in the performance of his regular work over familiar territory; no train was approaching; the railroad signal lights showed green, allowing motorists to continue across the tracks, and were observable to a pedestrian approaching the highway; he was not at a street junction, or upon a cross walk; he was in full possession of his perceptive faculties; he was dressed in dark clothes; he was emerging upon the highway from comparative obscurity, because of night darkness, cloudy sky and rain; the highway he was to cross was level and straight in both directions; there was but one automobile approaching the crossing; its headlights were on; it was upon its own right side; it continued in a direct course; it was not travelling at excessive speed.

Upon these physical facts the jury was justified in reaching the conclusion that the fatal accident would not have happened if the plaintiff's intestate had been in the exercise of due care. As said in *Fernald* v. *French*, 121 Me., 4, 115 A., 420, 421:

> "In coming to a reasonable conclusion, not only the testimony but circumstances and conditions must be considered.... So, in this case, the manner of the accident furnishes inherent evidence of what took place, when construed in the light of the law applicable to this class of cases."

Motion for new trial overruled.

ANNIE LAURA ROSE, ADMINISTRATRIX,
ESTATE OF JACOB W. SILLIKER

vs.

GEORGE OSBORNE, JR.

Androscoggin. Opinion, February 16, 1940.

EQUITY. TRUSTS.

The defense of a new and distinct cause of action set forth in a supplemental bill may be taken advantage of by demurrer when apparent by the bill.

Relief different from that sought in the original may be obtained by a proper supplemental bill, where the cause of action is the same.

While the prayer of a supplemental bill may ask for other and different relief from that demanded in the original bill, the new matter introduced should be such as refers to and supports the case made in the original bill and the prayer should likewise be in furtherance of that case. An inconsistency between the supplemental bill and the original bill either as regards subject matter or prayer is fatal.

Where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle.

A claimant is entitled to priority only if and to the extent he is able to trace his property into a product in the hands of the wrongdoer at the time when he seeks to enforce his claim. If at that time the wrongdoer's assets include in one form or another the claimant's property, the claimant is entitled to restitution out of those assets. If the wrongdoer's assets do not include the claimant's property, he is not entitled to priority.

A decree must follow the mandate and a single justice can not enlarge or limit or modify the scope of the mandate or hinder or delay its execution.

On report. Suit in equity by Annie Laura Rose, Administratrix of estate of Jacob W. Silliker, against George Osborne, Jr., to recover the proceeds of three savings accounts which originally stood in the name of Jacob W. Silliker, deceased. Defendant filed demurrer as a part of his answer to the supplemental bill. Demurrer sustained.

Case remanded for a decree in accordance with this opinion. Case fully appears in the opinion.

Berman & Berman (Lewiston, Maine), for plaintiff.

Ralph W. Crockett, for defendant.

SITTING: DUNN, C. J., STURGIS, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. On report. Thrice heretofore these parties have presented litigation to this Court pertaining to the three savings accounts still involved: viz., one in Androscoggin County Savings Bank of Lewiston, Maine, another in Savings Bank of New London, Connecticut, and still another in Mariners Savings Bank, also of New London.

That first determined was the ownership of these accounts between the plaintiff, the administratrix of the estate of Jacob W. Silliker, the depositor, and George Osborne, Jr., his nephew, the latter having claimed all of them by reason of alleged gifts *inter vivos*. In that action (*Rose* v. *Osborne*, 133 Me., 497, 180 A., 315) it was held that there had been a valid gift *inter vivos* to the defendant only of the account in the Savings Bank of New London.

Therein the Law Court directed that decree issue in accordance with the opinion. Counsel for the plaintiff drafted a decree, to which defendant's counsel filed corrections. Equity Rule XXVIII. Although hearing was had, no decision was *then* rendered by the single justice. No doubt having learned that before the issuance of the injunction on the original bill the defendant had withdrawn money from the Mariners Savings Bank and the Androscoggin County Savings Bank accounts, the plaintiff "sought by the terms of the decree to force the application" of the deposit in the Savings Bank of New London "to make good the deficiency."

But before decree was signed, the plaintiff brought a so-called supplemental bill seeking to accomplish the same purpose thereby. That supplemental bill was not heard below, but, together with the question as to the decree on the original bill, was reported to the Law Court. In *Rose, Adm'x* v. *Osborne, Jr.*, 135 Me., 467, this report was discharged, the Court saying on page 469, 199 A., 623, 624:

"If the so-called supplemental bill is in the nature of an addition to or continuance of the orignial bill, it will not lie, for the case stood as finally decided by the Law Court on the filing of the mandate. If the so-called supplemental bill is in the nature of a bill to enforce a decree, it is premature, if brought before the entry of the decree on the original bill."

Thereafter, decree on the original bill was signed and filed in which, as to the Androscoggin County Savings Bank account, it was adjudged:

"That on the date of the death of the said Jacob W. Silliker, the amount of said deposit in said Androscoggin County Savings Bank aggregating $5481.18, came into the possession of the defendant, who holds the same for the use and benefit of the plaintiff.

". . . That the said plaintiff as the Administratrix of the Estate of the said Jacob W. Silliker, is entitled to receive from the said defendant the said sum of $5481.18, together with the increase thereof, and the said defendant is hereby ordered to pay the same to the said plaintiff within twenty days from the date of the signing of this Decree, including the increase upon said sum to the date of said payment,"

and as to the Mariners Savings Bank account:

"That on the date of the death of said Jacob W. Silliker, the amount of said deposit in said Mariners Savings Bank amounting to $7301.72 was the property of the said Jacob W. Silliker and not the property of the defendant.

". . . That on the date of the death of the said Jacob W. Silliker, the amount of said deposit in said Mariners Savings Bank amounting to $7301.72 came into the possession of the defendant, who holds the same for the use and benefit of the plaintiff.

". . . That the said plaintiff as the Administratrix of the Estate of the said Jacob W. Silliker, is entitled to receive from the said defendant the sum of $7301.72, together with the in-

crease thereof, and the said defendant is hereby ordered to pay the same to the said plaintiff within twenty days from the date of the signing of this Decree, including the increase upon said sum to the date of said payment."

By this decree it was also adjudged:

"That the accounts standing in the Savings Bank of New London on the date of the death of the said Jacob W. Silliker were the property of the defendant, so that he is entitled to receive the same."

Thus the plaintiff did not obtain by decree the relief sought: viz., restoration of said withdrawals by use of the defendant's account in the Savings Bank of New London.

To this decree she took exceptions which were argued before and overruled by this Court. *Rose, Admx.* v. *Osborne, Jr.*, 136 Me., 15, 1 A., 2d, 225. The opinion in that case came down August 16, 1938. Two days later she brought this present bill which her counsel terms a "supplemental bill in the nature of a bill to enforce a decree,"—viz., the decree on the original bill.

The defendant, in his answer to the pending supplemental bill, inserted a demurrer which, as we view the law dispositive of this case, alone needs to be considered.

The defense of "a new and distinct cause of action" set forth in a supplemental bill "may be taken advantage of by demurrer when apparent by the bill." Whitehouse Equity Practice, Vol. 1, Sec. 135, page 261. Relief different from that sought in the original may be obtained by a proper supplemental bill, where the cause of action is the same.

"It," meaning the supplemental bill, "will never lie to introduce a new cause of action which has arisen since the filing of the original bill. . . ." Whitehouse, *supra*, page 259.

In *Birmingham* v. *Lesan*, 77 Me., 494, the following quotation on page 498, 1 A., 151, 152, is taken with approval from *Pinch* v. *Anthony*, 10 Allen, 470:

". . . we know of no case that goes so far as to authorize a party who has no cause of action at the time of filing his origi-

nal bill, to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill."

In the Massachusetts case, *supra*, it was also stated on page 477:

"*Milner* v. *Milner*, 2 Edw. R., 114, is an authority against allowing a new cause of action to be stated in a supplemental bill. But the plaintiff may by means of a supplemental bill introduce into his case facts that have occurred since the original bill was filed. The extent to which this may be done is not definitely settled. But if he goes too far in this respect, the defendant has opportunity to object to it when leave is asked to file the supplemental bill; *Pedrick* v. *White*, 1 Met., 76; or by demurrer to the bill for that cause after it is filed."

In 19 Am. Jur., it is stated in Sec. 350 on page 244:

"While the prayer of a supplemental bill may ask for other and different relief from that demanded in the original bill, the new matter introduced should be such as refers to and supports the case made in the original bill and the prayer should likewise be in furtherance of that case. An inconsistency between the supplemental bill and the original bill either as regards subject matter or prayer is fatal."

Judge Story, in his Commentaries on Equity Pleadings, stated on page 323:

"But where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to *that decree*, and not to obtain *relief of a different kind on a different principle*; the latter being the province of a supplementary bill in the nature of a bill of review, which cannot be filed without the leave of the court." (Underscoring ours.)

In the original bill the fact of these withdrawals did not appear. No relief therefor was sought therein, but following filing of the opinion, such relief by decree, as already stated, was asked and denied. As to that decree, this Court stated (*Rose, Adm'x* v. *Osborne*,

Jr., 136 Me., on page 18, 1 A., 2d, 225), "What the justice did was right."

The relief heretofore denied is now sought in this pending supplemental bill, but it can not be given if it sets forth a new and distinct cause of action. The remedy, if any, would be by a new process, not supplemental.

Is the present cause of action new and distinct? We think so. The purpose of the original bill was only to determine the ownership of these bank accounts, and to give the plaintiff possession of that determined to be her property, not other property determined to be that of the defendant.

These accounts, although originally owned by Mr. Silliker, were entirely distinct from one another, as much so as though, instead of being bank accounts, there had been a bank account, a bond, and a certificate of stock. The defendant's unsuccessful attempt to prove ownership of all of them was based on alleged gifts *inter vivos* at and upon different times and occasions. The accounts did not constitute one fund.

What the plaintiff is now attempting to do in order to make up the withdrawals aforesaid is to reach and apply property heretofore determined to belong to the defendant. Without claiming to be able to trace her property or any part of it into the account in the Savings Bank of New London, she seeks to impress a trust thereon. This, we think, constitutes a different cause of action from that set forth in the original bill.

The plaintiff cites *Draper* v. *Stone, Admr. et al.*, 71 Me., 175. The action there was for specific performance of a contract to convey eighteen shares of stock held by the defendant in trust for the plaintiff. The defendant breached the trust by disposition of eight shares thereof. The Court held that inasmuch as the trustee held like stock of his own sufficient therefor, he must therefrom replace that sold and so ordered him to assign eighteen shares to the plaintiff, including eight of his own. In that case there was no supplemental bill. The Court had no occasion to decide what might have been done under a supplemental bill which stated a different cause of action. Cited in the opinion is Story's Equity Jurisdiction, Sec. 1263 as to replacement of property wrongfully converted by a trustee, but in Sec. 1259, in discussing the rights of a cestui que trust where the *res* had been so disposed of by the trustee, Judge Story had stated:

"So, if A. entrusts money with a broker, to buy Bank of England stock for him, and he invests the money in American stock, A. is entitled to, and may maintain an action at law for those stocks, in whosesoever hands he finds them, not being a purchaser for a valuable consideration without notice. It matters not in the slightest degree into whatever other form, different from the original, the change may have been made, whether it be that of promissory notes, or of goods, or of stock; for the product of a substitute for the original thing still follows the nature of the thing itself, *so long as it can be ascertained to be such.* The right ceases only, when the means of ascertainment fail; which, of course, is the case, when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description." (Underscoring ours.)

In *Annis* v. *Security Trust Company*, 133 Me., 223, 175 A., 661, this Court has dealt recently with the doctrine of tracing trust property.

In Sec. 521, Vol. 3, of Scott on Trusts, the author, having stated four possible views as to the right of the owner of misappropriated property to priority over the general creditors of the wrongdoer, says on page 2498:

"The best view, it is submitted, is that the claimant is entitled to priority only if and to the extent that he is able to trace his property into a product in the hands of the wrongdoer at the time when he seeks to enforce his claim. If at that time the wrongdoer's assets include in one form or another the claimant's property, the claimant is entitled to restitution out of those assets. If the wrongdoer's assets do not include the claimant's property, he is not entitled to priority. This is the view which is taken by the stronger courts, including the Supreme Court of the United States."

In this supplemental bill, the plaintiff alleges insolvency of the defendant. This is denied in the answer. Thus insolvency might be an issue of fact and if it were determined to exist, would raise the question whether the plaintiff, if not able to trace her property into

that of the defendant, could impress a trust on the latter to the prejudice of the defendant's general creditors. We speak of this to show how different an issue this is from those presented by the original bill.

Plaintiff also relies on *Farnsworth, Admx.* v. *Whiting et al.*, 106 Me., 543, 76 A., 942, 943, but in that case (dealing with the well-established principle that a decree must follow the mandate and that a single justice can not enlarge or limit or modify the scope of the mandate or hinder or delay its execution), the Court said:

> "In other words, a single Justice should sign such a decree as will *effectuate the decision of the court* and give to the prevailing party such remedy as the court decides he is entitled to." (Underscoring ours.)

The Court also stated that "subsidiary process, if necessary, to enforce *such decree*" (underscoring ours) would issue, but it is to be observed that in that case it had been decided that the one asking for the process was entitled to receive the identical property sought. Then the Court stated:

> "To simply enter a decree to that effect while the nominal title still rests in the plaintiff, would be but one step in securing to the defendants their rights. It would decide that the defendants were entitled to the property but could not have it unless another bill in equity were brought to compel the transfer. This would be a useless formality and a court of equity cannot be so impotent."

Thus we distinguish that from the instant case.

We repeat: we consider that this supplemental bill sets forth a new cause of action separate and distinct from that in the original, and that being so, the relief now sought can not be granted.

Besides seeking to have a trust impressed upon the defendant's account in the Savings Bank of New London, plaintiff asks that the accounts in the two other banks be transferred or assigned to her in their depleted state. This relief should not be granted on this bill. The single justice has already decreed, as above noted, that the defendant pay the amounts due on said accounts to her. An amendment of that decree by the single justice could be made to accomplish an

assignment of the accounts themselves to the plaintiff without enlarging, limiting, or modifying the scope of the mandate in the original bill or hindering or delaying its execution. *Farnsworth, Admx.* v. *Whiting et al.*, supra.

The demurrer is well founded and must be sustained. The case is remanded for a decree in accordance with this opinion.

So ordered.

(DUNN, C. J., having deceased, did not join in this opinion.)

HELEN H. BRONSON, APPELLANT

FROM

DECREE OF JUDGE OF PROBATE.

IN RE ESTATE OF ALBRA A. DENNIS.

Penobscot. Opinion, March 2, 1940.

PROBATE COURTS. EXCEPTIONS.

A decree of a Justice of the Supreme Court of Probate under the Statutes of Maine can not be reviewed on appeal.

The excepting party is bound to see that the bill of exceptions includes all that is necessary to enable the court to decide whether the rulings of which he complains were or were not erroneous. Failing so to do, his exceptions must fail.

The Law Court under R. S., Chap. 91, *Sec.* 24, *has jurisdiction over exceptions in civil and criminal proceedings only when they present in clear and specific phrasing the issues of law to be considered. The presentation of a mere general exception to a judgment rendered by a justice at* nisi prius *is not sufficient under the statute. An exception to a judgment rendered in the Supreme Court of Probate is within the rule.*

On appeal and exceptions. Case arises out of an appeal from the decree of the Judge of Probate for Penobscot County allowing the second account of William H. Waterhouse, former trustee under

the will of Albra A. Dennis. Appeal denied in the Supreme Court of Probate. Exceptions reserved and accompanied by an appeal to the Law Court are sent forward for review. Appeal dismissed. Exceptions overruled. Case fully appears in the opinion.

Bernard Gibbs, for appellant.

Stanley F. Needham, for appellee.

SITTING: DUNN, C. J., STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. This case arises out of an appeal from the Decree of the Judge of Probate for Penobscot County allowing the second account of William H. Waterhouse, former Trustee under the will of Albra A. Dennis, late of Greenbush, deceased. In the Supreme Court of Probate, the appeal was denied. Exceptions there reserved, accompanied by an appeal to the Law Court, are sent forward for review.

The appeal must be dismissed. A decree of a Justice of the Supreme Court of Probate under the statutes of this state can not be reviewed on appeal. *Tuck* v. *Bean*, 130 Me., 277, 155 A., 277; *Cotting* v. *Tilton*, 118 Me., 91, 106 A., 113.

The bill of exceptions recites that at the hearing in the Supreme Court of Probate the appellant offered a certified copy of the inventory which the executor of the estate of the testatrix, Albra A. Dennis, filed in the original administration proceedings and it was excluded and exception noted. What the inventory would have shown does not appear. It should have been printed as a part of the bill of exceptions. Not being printed, it is impossible to determine whether its exclusion was prejudicial error. The excepting party is bound to see that the bill of exceptions includes all that is necessary to enable the court to decide whether the rulings of which he complains were or were not erroneous. Failing so to do, his exception must fail. *Gross* v. *Martin*, 128 Me., 445, 148 A., 680. *Richardson* v. *Lalumiere*, 134 Me., 224, 184 A., 392.

The remaining exception is directed generally and indiscriminately to the judgment below denying the appeal from the Probate Court of original jurisdiction without assignment of the specific error of law upon which the exceptant relies. It reads:

"At the conclusion of the hearing the Presiding Justice ruled 'Appeal denied.' To said ruling the appellant excepted and the exception was noted.

"Helen H. Bronson, the appellant, says said rulings were erroneous and prejudicial to her and she excepts thereto, and prays that her exceptions be allowed."

It is now well settled that this Court under R. S., Chap. 91, Sec. 24, has jurisdiction over exceptions in civil and criminal proceedings only when they present in clear and specific phrasing the issues of law to be considered. The presentation of a mere general exception to a judgment rendered by a justice at *nisi prius* is not sufficient under the statute. *Gerrish, Exr.* v. *Chambers et al.*, 135 Me., 70, 189 A., 187. An exception to a judgment rendered in the Supreme Court of Probate is within the rule.

Appeal dismissed.
Exceptions overruled.

(DUNN, C. J., having deceased, did not join in this opinion.)

DURWARD L. HINCKLEY'S CASE.

Aroostook. Opinion, March 4, 1940.

WORKMEN'S COMPENSATION ACT.

Where there was no evidence of a well-established, general custom of which both parties had actual knowledge or of which their knowledge might be presumed, evidence to show that it was not the custom for defendant employer to send a fireman with steam shovel was inadmissible.

Where commissioner determined that accident did not happen in the course of the employment, it was inevitable that he should find that it did not "arise out of the employment."

A ruling, by a commissioner in an industrial accident case, based in part on inadmissible testimony and in part on a misapprehension of an admitted fact is an error of law which the Law Court is required to correct.

On appeal. The petitioner, Durward L. Hinckley, seeks compensation for an industrial accident. After hearing the Commission dismissed petition. A confirmatory decree was entered and the petitioner appealed. Appeal sustained. Decree reversed. Case to be recommitted for further proceedings. Case fully appears in the opinion.

Berman & Berman (Lewiston, Maine), for petitioner.

Robinson & Richardson, for respondent.

SITTING: BARNES, C. J., STURGIS, THAXTER, HUDSON, MANSER, WORSTER, JJ.

THAXTER, J. The petitioner, Durward L. Hinckley, who claims that he was an employee of the Bridge Construction Corporation, seeks compensation for an industrial accident. After a hearing the Commission found that the accident did not arise out of and in the course of the employment and ruled that the petition should be dismissed. A confirmatory decree was entered and the petitioner appealed.

The petitioner had been in the employ of the company as a fireman on a steam shovel just prior to the week commencing June 4, 1939. The job was completed and he had gone to his home. The shovel was left at Waterville. On Sunday, June 4, Rossi, the superintendent of the company, called Sydney Knott at Phillips who had operated the shovel, told him that the apparatus had to be moved for a job at Van Buren, and asked him to go with the shovel to Van Buren and to operate it there. Knott asked if the petitioner could have the job of firing, and Rossi assented to such employment. The shovel was to be transported to Van Buren on a truck. Knott and Hinckley drove in Knott's automobile to Waterville. On Monday morning Hinckley fired the boiler, and Knott drove the shovel under its own power and placed it on the truck. Hinckley rode on the truck keeping up the fire under the boiler for a time after they had started. Knott drove in his car to Augusta apparently to get a license and joined the truck later on the route. Thereafter Hinckley rode with him. The next day at Haynesville they came to a low overhead bridge. The duffel pipe on top of the boiler would not clear this, and Knott told the petitioner that they would have to remove

the pipe. The petitioner got up on the truck, Knott passed him a wrench, and while the petitioner was attempting to unscrew the pipe, he fell and suffered a broken back for which he now claims compensation.

It is not altogether clear on just what ground the commissioner bases his finding that the accident did not arise out of and in the course of the employment.

Apparently he found that Hinckley was not in the employ of the Bridge Construction Corporation, because his duties and compensation were not to start until the work at Van Buren commenced. In making this ruling the commissioner seems to have overlooked the fact that Hinckley's duties commenced at Waterville when he fired the boiler; and counsel for the insurance carrier concedes that he was in the employ of the company at least up to the time that the shovel was loaded on the truck. No other conclusion is possible because after the accident the petitioner was offered his pay for such work. If any issue on employment was presented to the commissioner, it was rather whether the employment ceased when the shovel was loaded and not when it was to commence. In determining this question it was important for the commissioner to consider all of the events of Monday — that Knott was absent for a part of the journey, that the petitioner rode on the truck with the apparent understanding that it might be necessary to get up steam in the boiler en route, if it were necessary to remove the shovel from the truck to get under a bridge or other obstruction. These important factors bearing on the petitioner's status were apparently not considered by the commissioner because of his failure to realize that the employment actually started in Waterville on the morning of June 6.

Evidence seems to have been admitted to show that it was not the custom for the defendant employer to send a fireman with the shovel. Such evidence apparently influenced the decision. The record, however, does not disclose evidence of a well-established, general custom of which both parties had actual knowledge or of which their knowledge might be presumed. The evidence received was clearly inadmissible and the question was not what had been done in other cases by this employer but what was the agreement here.

The commissioner also found that the accident did not arise out of the employment because Hinckley in unscrewing the pipe was doing

something outside of his duties as a fireman. At first glance this seems like a narrow limitation on the scope of this man's duties in an operation of this particular kind. But it is unnecessary at this time to decide this question. Having determined that the accident did not happen in the course of the employment, it was inevitable that the commissioner should find that it did not arise out of the employment. *Fournier's Case*, 120 Me., 236, 113 A., 270; *Wheeler's Case*, 131 Me., 91, 159 A., 331. If the decision on the first question should be the other way, it may well be that a more discriminating analysis of the evidence touching the second may change the result.

The ruling in this case seems to have been based in part on inadmissible testimony, in part on a misapprehension of an admitted fact. Under such circumstances an error of law was committed which this Court is required to correct. *Gauthier's Case*, 120 Me., 73, 113 A., 28. See *Mailman's Case*, 118 Me., 172, 176, 106 A., 606.

Appeal sustained.
Decree reversed.
Case to be recommitted for further proceedings.

JOHN E. MITCHELL *vs.* FRANCES HAMMOND MITCHELL.

Hancock. Opinion, March 23, 1940.

DIVORCE. JUDGMENT. MARRIAGE. FRAUD. EXCEPTIONS. EVIDENCE. WITNESSES. ANNULMENT.

It is a general rule that parties are estopped from litigating issues which had been previously and finally decided between them on the merits of the controversy by a court of competent jurisdiction, and this rule applies to proceedings for annulment of marriage.

Where libelant charges in his libel, among other things, that the marriage was obtained by duress and the same issue was tried and decided on the merits of the controversy, between the same parties in Florida, the libelant is estopped from presenting the same claim for judicial determination in Maine.

The general rule that judgment is conclusive in subsequent suit between same parties for same cause of action as to all matters which might have been tried, as well as those actually tried, in action wherein rendered, is inapplicable where issue was not decided by trier of facts, but expressly reserved for hearing in another case, even if such reservation was erroneous and resulted in splitting cause of action.

An erroneous judgment of a competent court having jurisdiction of the parties and subject matter remains binding on the parties until reversed.

Where master, appointed by Florida court to take testimony in libelant's suit to annul marriage, did not decide, but expressly reserved for another hearing, question of paternity of libelee's child, libelant is not estopped by such court's decree dismissing bill to present issue of fraud inducing him to marry in subsequent annulment suit brought by libelant in Maine.

Libelant, who was afforded a full hearing below on the merits of fraud and deceit, has no cause for complaint if his libel was properly dismissed for failure to prove that charge, for any of the reasons stated in the decree.

There is a common-law presumption of legitimacy of a child born in wedlock, although conception took place before marriage. This presumption may be overcome by evidence.

Fraud inducing marriage is not to be presumed, and the burden is upon the libelant to establish it.

If a man is induced to marry a woman who he knows is pregnant, believing and relying upon false and fraudulent statements made to him by her to the effect that he is the father of child with which she is pregnant, when, unknown to him, her pregnancy was caused by another, the marriage may be annulled for fraud, provided it has not been ratified or confirmed.

The mere fact that the husband had had sexual intercourse with his wife before they were married will not bar him from seeking such annulment.

Although proceeding for an annulment of marriage is based upon alleged fraud and deceit, it is unlike an ordinary action of deceit. In an ordinary case of deceit, only the parties are interested, while in the proceeding for annulment of marriage, not only the parties themselves are concerned; but society as a whole, and the child whose status might thereby be affected, have a very vital interest in the case; nevertheless, the rules of law generally applicable to ordinary actions of deceit may be applied.

To recover in an action for deceit, something more than the falsity of the statement relied upon must be shown. Each and every other element required to constitute deceit must be proved, and when it is apparent that any one of them has failed of proof, the plaintiff is not entitled to relief.

For the libelant to prevail in this case on the ground of deceit, the burden is upon him to prove, among other things, that at the time of the marriage he believed to be true the statement made to him by the libelee as to the paternity of the child, that he relied and acted upon it, and was thereby, to some extent at least, induced to and did marry her; although he was not required to show that her statement was the sole or even principal reason for the marriage.

A false statement, unbelieved, and not relied or acted upon, and having no influence on decision, furnishes no ground for relief in a case of alleged deceit.

If statement of the libelee as to the paternity of the child is false, yet, in order to prevail, the libelant must still prove that at the time of the marriage he believed the statement was true, relied thereon and was thereby, to some extent at least, induced to marry the libelee.

Whether the libelant in this case believed the statement of the libelee as to the paternity of the child, relied on it, and was thereby somewhat influenced to marry her; or whether he married her for the sole and only purpose of obtaining his release from arrest without having had, at the time of marriage, the slightest belief in her statement, and without having placed any reliance whatsoever thereon, was a question of fact for the trial court.

Findings of fact by the court, without the assistance of a jury, are final and conclusive if supported by evidence of real worth and probative value.

Exceptions do not lie to the findings of fact by a single justice unless found without evidence or contrary to the only inferences to be drawn from the testimony when viewed in the light most favorable to prevailing party.

If a finding of fact by the court is not supported by evidence, or if the only inference to be drawn does not support the decision, then "the finding is an erroneous decision of the legal conclusions to be drawn from the evidence, and is error in law, to correct which exceptions will lie."

Whether the ruling of the court to the effect that the libelant had failed to show he entered into the marriage on account of the representation of the libelee as to the paternity of the child is a finding of fact, or whether it is a mere legal conclusion from facts, is immaterial, for, in either event, it presents the question "whether as a matter of law the evidence, which is made a part of the exceptions, warrants the decree."

The testimony of a witness as to his belief and motive is not usually, if ever, susceptible of direct contradiction. The fact that the testimony of a party to a suit is not directly contradicted does not necessarily make it conclusive and binding upon the court. It is not to be utterly disregarded and arbitrarily ignored without reason. It should be carefully considered and weighed with all other evidence in the case and with all of the inferences to be properly drawn from facts established by the evidence; but if, on the whole case, it appears that such testimony, is un-

true, the court is not required to put the stamp of verity upon it, merely because it is not directly contradicted by other testimony.

If it appears that a party's testimony is inconsistent with his former contention on the same point, the court may take that fact into consideration, giving to it, only such weight, if any, as may be proper in the circumstances of the case; and for the purpose of showing such inconsistency, the pleadings in another case between the same parties may be resorted to.

When a bill in equity filed by libelant in Florida was not signed by himself, but signed for him by his solicitor, the libelant must be deemed to have adopted the allegations quoted as his own statement of the case, for they set forth the very foundation upon which his whole claim of duress and coercion rested, and upon which he actually prosecuted his case to final judgment.

The doctrine seems to be settled that pleadings in another suit may be used as admissions of the party, where they bear upon the material issues on trial and appear to have been made by his direction or adoption, shown by prosecuting the action upon them, as the foundation of his claim.

The weight of evidence is for the presiding justice and in passing upon it, he had the right to take into consideration not only the appearance of the libelant while on the witness stand, and his manner of testifying, but also the probability or improbability of his statement in the light of all of the other facts and circumstances established by proof.

The credibility of the libelant is for the trier of facts, and it was for him to decide whether the libelant's testimony as to his belief in and reliance on the libelee's statement as to the paternity of the child, at the time of their marriage, truly disclosed the state of his mind at that time, or whether it merited unbelief.

A finding of fact, unsupported by evidence, not affecting the decision, is no ground for reversal.

Coition is unnecessary in the case of a ceremonial marriage.

In the absence of statute or rule of court, the presiding justice, sitting without a jury, is not required to make special findings of fact, and much less is he required to set forth the evidence upon which the findings were based, or to give in detail the reasons for decision rendered.

Chapter 91, *Sec.* 58 *of the R. S. requiring findings of fact when requested, is a statutory rule of practice in equity cases; while Chap.* 62, *Sec.* 63, *deals with practice before the Public Utilities Commission.*

Libel as for divorce for annulment of marriage is purely statutory proceeding.

Proceedings for annulment are not brought in Maine by a bill in equity, filed on the equity side of the court, but by a libel as for divorce for annulment of marriage as provided by statute. By legislative enactment, the validity of a marriage

is to be tested and determined at a hearing on a libel as for divorce, and in such a proceeding the rules of practice in libels for divorce are to be followed so far as they are applicable.

A proceeding for annulment of marriage has been held to be a "divorce suit" under some statutes.

A divorce suit is not a proceeding in equity.

Equitable considerations prevail in hearing a libel as for divorce for annulment of marriage alleged to have been procured by fraud; but the application of equitable principles does not change the form of action. Equitable considerations prevail in some actions at law without converting the proceedings into equity cases.

Equitable considerations must prevail in a libel as for divorce for annulment so far as the nature of the process will admit but not to the extent of converting such libel into a bill in equity to be governed by the rules of practice peculiar to equity.

According to the better practice, in an action for libel as for divorce for annulment of marriage, the marriage in this case should have been affirmed, yet the entry of "libel dismissed" after a full hearing on the merits of the controversy, constituted a final judgment disposing of the case, and will bar further action by the same parties for the same cause, although the statute was not literally followed.

On exceptions. Libel as for divorce for annulment of marriage on the ground of alleged fraud, deceit and duress, brought under the provisions of R. S., Chap. 73, Sec. 15. Case heard by the court, without the assistance of a jury, with the right of exceptions reserved to both parties on questions of law. Decision was for the libelee, and the libel was dismissed. Libelant filed exceptions to the decision, to the findings made, and to the omission to make other requested findings. Exceptions overruled. Case fully appears in the opinion.

Deasy, Lynam, Rodick & Rodick, for plaintiff.

Blaisdell & Blaisdell, for defendant.

SITTING: BARNES, C. J., STURGIS, THAXTER, HUDSON, MANSER, WORSTER, JJ.

WORSTER, J. On exceptions. Libel as for divorce for annulment of marriage on the ground of alleged fraud, deceit and duress, brought under the provisions of R. S., Chap. 73, Sec. 15.

It was heard by the court, without the assistance of a jury, with the right of exceptions reserved to both parties on questions of law.

Decision below was for the libelee, and the libel was dismissed with a ruling, briefly stated, that the libelant must fail "for two reasons, either of which is sufficient"—first, because he had not shown by a fair preponderance of the evidence that he had been induced by fraud to marry the libelee; second, because the alleged matters relied on had been already "adjudicated in the Florida Courts."

The case is here on libelant's exceptions to that decision, to the findings made, and to the omission to make other requested findings.

The court below found that:

"The libellant and libellee are both residents of Hancock County, Maine.

"The history of the case, according to the evidence is, that the parties, about a year prior to the latter part of April or the early part of May 1936, commenced keeping company, and first had sexual intercourse the latter part of April or the early part of May, 1936.

"During the summer of 1936 the libellee notified the libellant that she was pregnant, and he agreed to marry her, but did not do so. That fall or winter the libellant went to West Palm Beach, Florida, and later the libellee went there. On December 12, 1936 the libellee had the libellant arrested on a bastardy process, and he went to jail. After staying in jail a short time, he married the libellee and was released. The parties have never cohabited since the marriage and the marriage has never been consummated.

"In January 1937, after the birth of the child, the libellant brought a Bill in Equity in the Courts of Florida, asking that the marriage be declared null and void, because he went through the marriage ceremony on account of fear, and that he never gave his consent to the marriage ceremony. That Court dismissed the Bill.

"In the action at bar, the libellee answers and denys that she induced the libellant by threat, duress, fraud or false state-

ments to marry her, and says when he married her he acted freely, and she sets up as a further defense the judgment of the Florida Court cited above."

Passing to the reasons given by the presiding justice for dismissing the libel, let us first consider the ground last stated in the decree, which reads as follows:

"SECOND: The subject matter litigated in the Florida Court was annulment of marriage. That same subject is being litigated here. The libellant contends that fraud was not relied upon in the Florida proceedings. It is immaterial whether it was or not. Fraud could have been set up in the Bill brought there. And the test is, what could have been set up, not what was set up.

"The Court finds as a matter of law that this matter was adjudicated in the Florida Courts."

Have the matters relied on by the libelant in the instant case been already judicially decided between the parties?

Perhaps this question may be better discussed by dividing it into two parts:

1. Have the matters relied upon by the libelant to support his allegation of duress been adjudicated?

It is a general rule that parties are estopped from litigating issues which had been previously and finally decided between them on the merits of the controversy by a court of competent jurisdiction. *Fuller* v. *Eastman*, 81 Me., 284, 17 A., 67; *Morrison* v. *Clark*, 89 Me., 103, 107, 35 A., 1034; *Parks* v. *Libby*, 90 Me., 56, 57, 37 A., 357; *Burns* v. *Baldwin-Doherty Co.*, 132 Me., 331, 170 A., 511.

And this rule applies to proceedings for annulment of marriage. *Sargent, Petitioner*, 115 Me., 130, 98 A., 117.

In the instant case, the libelant charges in his libel, among other things, that this marriage was obtained by duress. This is the same issue that was tried and decided on the merits of the controversy, between the same parties, in the case heard in Florida, and the libelant is estopped from now presenting the same claim for judicial determination.

Moreover, his attorney concedes that the question of duress is not open to him here, and so this point may be considered as abandoned by him.

2. Have the matters relied upon by the libelant to support his allegation of fraud and deceit been adjudicated?

The fraud and deceit claimed by the libelant is that he was induced to marry the libelee because of her alleged false and fraudulent misrepresentations to him that he was the father of the child with which she was pregnant, then believed and relied on by him, but which he claims he has since ascertained is false.

In the bill filed in the Florida court appear allegations to the effect that, though the defendant claimed at the time of the marriage that the plaintiff was the father of the child with which she was then pregnant, yet he was not the father and could not have been.

On the allegation that the libelant was not the father of the child, issue was there taken by the defendant, and much evidence was offered as to whether or not the child to whom she gave birth was a full-term child, but neither the master nor the court decided that point.

Nevertheless, the libelee contends, and the court below ruled, that the issue of fraud and deceit now raised could have been decided in that case, so is *res judicata* here, and she invokes the following rule laid down in *Ketch* v. *Smith*, 128 Me., 171, 173, 146 A., 247:

> "It is accepted law in this State, that, conceding jurisdiction, regularity in proceedings, and the absence of fraud, a judgment between the same parties is a final bar to any other suit for the same cause of action, and is conclusive not only as to all matters which were tried, but also as to all which might have been tried in the first action."

However, the general rule relied on by the libelee has no application to a case where the issue was not decided by the trier of facts, but expressly reserved by him for hearing in another case. 34 Corpus Juris, page 797; 24 Am. & Eng. Encyc. of Law (2 ed.), 776; *Martin et al.* v. *Turner* (Ky. 1909), 115 S. W., 833; *Burns et al.* v. *Nichols* (Tex. 1918), 207 S. W., 158; *Hardin* v. *Hardin et al.* (S. D.), 129 N. W., 108, 111.

Even if such a reservation of the issue for another hearing was erroneous, and actually resulted in splitting the plaintiff's cause of action, that would not bar him from again presenting the question for decision.

An erroneous judgment of a competent court having jurisdiction of the parties and subject matter remains binding on the parties until reversed. *Hardin* v. *Hardin et al.*, supra.

In the Florida case, the master appointed by the court to take the testimony, stated in the report he made to the court, which was afterwards accepted, that:

> "There has been a great deal of testimony before the Master on the necessary period of gestation, which makes some question about the paternity of the child. However, the Master does not consider it necessary that the Court pass upon this question in this particular case."

The reason for this summary dismissal of this evidence from consideration is not stated. The ruling does not purport to be based on the ground that the charge of alleged fraud and deceit was not properly presented by the pleadings. The ruling is an absolute one, and, while informal, plainly indicates that the question of the paternity of the child was not passed upon in decision, but was expressly reserved for another hearing. It is useless to discuss whether the master should have ruled on the question whether the claim of fraud and deceit was properly presented, and if so, to have decided that issue; or whether final decision of the marriage status could have been made without deciding that question; or whether failure to decide it resulted in splitting the plaintiff's cause of action. The fact remains that the master did not decide it but expressly reserved it, and the libelant is not now estopped from presenting the same issue here for decision.

Therefore, the ruling of the court below "that this matter was adjudicated in the Florida Courts" was erroneous in so far as the charge of fraud and deceit is concerned.

But that is not decisive here. That was not the only reason given by the court for the decision rendered. And the libelant, who was afforded a full hearing below on the merits of the allegation of fraud and deceit, has no cause for complaint if his libel was properly dis-

missed for failure to prove that charge, for any of the reasons stated in the decree. It will be necessary for us to consider only one of those reasons; and that one, stated substantially, is that the libelant failed to show that he entered into this marriage on account of the libelee's representations that he was the father of her then unborn child.

There is a common-law presumption of legitimacy of a child born in wedlock, although conception took place before marriage. *Reynolds* v. *Reynolds*, 3 Allen, 605, 610; *Wallace* v. *Wallace*, 137 Iowa, 37, 14 L. R. A. (N.S.), 544, 126 Am. St. Rep., 253, 114 N. W., 527, 530, 15 Ann. Cas., 761.

But that presumption may be overcome by evidence, and here the libelant contends that he has proved that he is not the father of the child; and that he was induced by fraud to marry the libelee. Fraud is not to be presumed, and the burden is upon the libelant to establish it. *Mitchell* v. *Lloyd*, 126 Me., 503, 140 A., 182.

If a man is induced to marry a woman who he knows is pregnant, believing and relying upon false and fraudulent statements made to him by her to the effect that he is the father of the child with which she is pregnant, when, unknown to him, her pregnancy was caused by another, the marriage may be annulled for fraud, provided it has not been ratified or confirmed. *Jackson* v. *Ruby*, 120 Me., 391, 115 A., 90, 19 A. L. R., 77; *Mitchell* v. *Lloyd*, supra; *Whitehouse* v. *Whitehouse*, 129 Me., 24, 149 A., 572.

The mere fact that the husband had had sexual intercourse with his wife before they were married will not bar him from seeking such annulment. *Jackson* v. *Ruby*, supra; Compare with notes, 11 A. L. R., 931, and 19 A. L. R., 80.

Although this proceeding for annulment of a marriage is based upon alleged fraud and deceit, yet it is unlike an ordinary action of deceit. In an ordinary case of deceit, only the parties are interested, while in this proceeding for annulment of marriage, not only the parties themselves are concerned; but society as a whole, and the child whose status might thereby be affected, have a very vital interest in the case; nevertheless, the rules of law generally applicable to ordinary actions of deceit may be applied. *Reynolds* v. *Reynolds*, supra; *Mitchell* v. *Lloyd*, supra; 18 R. C. L., 413.

To recover in an action for deceit, something more than the fals-

ity of the statement relied on must be shown. Each and every other element required to constitute deceit must be proved, and when it is apparent that any one of them has failed of proof, the plaintiff is not entitled to relief. It then becomes entirely unnecessary to decide whether or not the other required elements have been established by the evidence.

Now, in order for the libelant to prevail in this case on the ground of deceit, the burden is upon him to prove, among other things, that at the time of the marriage he believed to be true the statement made to him by the libelee as to the paternity of the child, that he relied and acted upon it, and was thereby, to some extent at least, induced to and did marry her; although he was not required to show that her statement was the sole or even principal reason for the marriage, (*Braley* v. *Powers*, 92 Me., 203, 210, 42 A., 362). *Matthews* v. *Bliss et al.*, 22 Pick., 48; *Hayward* v. *Passaic National Bank & Trust Company*, 120 N. J. E., 512, 186 A., 728, 730; *Long* v. *Woodman*, 58 Me., 49, 52; *Severance* v. *Ash*, 81 Me., 278, 17 A., 69; *Hotchkiss* v. *Coal & Iron Company*, 108 Me., 34, 41, 78 A., 1108; *Crossman* v. *Bacon & Robinson Company et al.*, 119 Me., 105, 109, 109 A., 487; *Richards* v. *Foss et al.*, 126 Me., 413, 415, 139 A., 231.

A false statement, unbelieved, and not relied or acted upon, and having no influence on decision, furnishes no ground for relief in a case of alleged deceit. *Butler* v. *Martin*, 247 Mass., 169, 173, 142 N. E., 42; *Matthews* v. *Bliss*, supra.

Even if, for the purpose of decision on another point, it should be assumed, but not decided, that the statement of the libelee as to the paternity of the child was false, yet, in order to prevail, the libelant must still prove that at the time of the marriage he believed the statement was true, relied thereon and was thereby, to some extent at least, induced to marry the libelee.

In *Patten* v. *Field*, 108 Me., 299, 81 A., 77, the Court said:

> "It may be conceded that a jury would not have been justified in this case in finding that the defendant did not make a false representation of a material fact, knowing it to be false, and with intent that it should be acted upon by the plaintiff, but can it be held that a jury would not have been justified in finding that the plaintiff did not reasonably believe the al-

leged representations, and did not rely upon them, and was not induced by them to pay . . . To make the question before us more concrete, assume that a jury had made a special finding that at the time the plaintiff signed the $800 note he did not believe the defendant's wool and sheep story, and was not induced thereby to sign the note, but signed it because he was personally interested to have the $1000 paid and thereby save the option, and expected the note could be paid from sales of stock, would such finding by a jury be sustainable in this case? We are constrained to the conclusion that it would."

Whether the libelant in this case believed the statement of the libelee as to the paternity of the child, relied on it, and was thereby somewhat influenced to marry her; or whether he married her for the sole and only purpose of obtaining his release from arrest without having had, at the time of marriage, the slightest belief in her statement, and without having placed any reliance whatsoever thereon, was a question of fact for the trial court. Decision was against the libelant, and the court added: "From the evidence one would be justified in believing that he entered into the marriage solely for the purpose of freeing himself from jail."

Findings of fact by the court, without the assistance of a jury, are final and conclusive if supported by evidence of real worth and probative value. *Matthews* v. *Bliss*, supra; *Patten* v. *Field*, supra; *Ayer* v. *Harris*, 125 Me., 249, 132 A., 742; *Bond* v. *Bond*, 127 Me., 117, 141 A., 833; *Ayer* v. *The Androscoggin and Kennebec Railway Company*, 131 Me., 381, 384, 163 A., 270; *Langevin, Admr.* v. *Prudential Insurance Company*, 132 Me., 392, 394, 171 A., 392.

Exceptions do not lie to the findings of fact by a single justice unless found without evidence or contrary to the only inferences to be drawn from the testimony (*Ayer* v. *Harris*, supra; *Pratt* v. *Dunham*, 127 Me., 1, 3, 140 A., 606), when viewed in the light most favorable to the libelee. *General Motors Acceptance Corporation* v. *Littlefield, Crockett Company*, 128 Me., 388, at 392, 147 A., 868.

But, the libelant excepts because, he contends, the findings in this case are not supported by evidence, and so are erroneous as a matter of law, and exceptionable.

If a finding of fact by the court is not supported by evidence, or

if the only inference to be drawn does not support the decision, then "the finding is an erroneous decision of the legal conclusions to be drawn from the evidence, and is error in law, to correct which exceptions will lie." *Chabot & Richard Co.* v. *Chabot*, 109 Me., 403, 405, 84 A., 892; *Weeks* v. *Hickey et al.*, 129 Me., 339, 342, 151 A., 890.

Whether the ruling of the court to the effect that the libelant had failed to show he entered into the marriage on account of the representation of the libelee as to the paternity of the child is a finding of fact, or whether it is a mere legal conclusion from facts (as was held in *Palmer et al.* v. *First Minneapolis Trust Company*, 179 Minn., 381, 230 N. W., 257), is immaterial, for, in either event, it presents the question "whether as a matter of law the evidence, which is made a part of the exceptions, warrants the decree." *Michels* v. *Michels*, 120 Me., 395, 396, 115 A., 161.

The record shows that the libelant testified, in substance and effect, that he voluntarily married the libelee upon her representation that he was the father of her child; that he believed that representation at the time of the marriage; that he acted upon it; and that he would not have married her if he had not believed it.

This testimony of the libelant is not directly contradicted. The testimony of a witness as to his belief and motive is not usually, if ever, susceptible of direct contradiction. The fact that the testimony of a party to a suit is not directly contradicted does not necessarily make it conclusive and binding upon the court. Of course it is not to be utterly disregarded and arbitrarily ignored without reason. It should be carefully considered and weighed with all of the other evidence in the case, and with all of the inferences to be properly drawn from facts established by the evidence; but if, on the whole case, it appears that such testimony is untrue, the court is not required to put the stamp of verity upon it, merely because it is not directly contradicted by other testimony. *Lang* v. *Ferrant*, 55 Minn., 415, 57 N. W., 140; *Zimmerman* v. *Bannon et al.*, 101 Wis., 407, 77 N. W., 735; *Blount* v. *Medbery*, 16 S. D., 562, 94 N. W., 428; *Bremer* v. *Haag*, 151 Ia., 449, 131 N. W., 667; *Harris* v. *Barret et al.*, 75 N. J. E., 386, 72 A., 956; *J. S. Brown & Bros. Mercantile Co.* v. *Sherrod et al.*, 53 Wash., 132, 101 P., 481; *Guinan* v. *Famous Players-Lasky Corporation*, 267 Mass., 501, 518, 167 N. E., 235; *Ashapa* v. *Reed*, 280 Mass., 514, 182 N. E., 859; *Logue* v.

The Grand Trunk Railway Company, 102 Me., 34, 65 A., 522; *L'Houx* v. *Union Construction Company*, 107 Me., 101, 77 A., 636, 30 L. R. A. (N. S.), 800; *Hughes* v. *Hughes*, 109 Me., 564, 84 A., 647.

In *Logue* v. *The Grand Trunk Railway Company*, supra, it was held that the testimony of a witness that he tied a rope around a post was disproved by the circumstances of the case, although there was no direct testimony to the contrary.

In *L'Houx* v. *Union Construction Company*, supra, the uncontradicted testimony of the plaintiff in a negligence case, that he did not know the effect of a heavy blow with a hammer on an iron pipe, did not warrant the jury in finding that he did not assume the risk, in the circumstances of the case.

In *Hughes* v. *Hughes*, supra, the *per curiam* opinion is more fully set forth in the Atlantic Reporter, in which it is stated:

> "At this trial no evidence for the defendants was introduced. But courts are not compelled to accept unreasonable and incredible evidence as a sufficient basis for a legal judgment, simply because it is not contradicted by direct and positive testimony."

Cases showing the divergent views on this subject are collected in 8 A. L. R., 796; and a discussion of the same topic is found in 20 Am. Jur., 1031.

If it appears that a party's testimony is inconsistent with his former contention on the same point, the court may take that fact into consideration, giving to it only such weight, if any, as may be proper in the circumstances of the case (70 C. J., 771); and for the purpose of showing such inconsistency, the pleadings in another case between the same parties may be resorted to. 20 Am. Jur., 543; Notes in 14 A. L. R., 51, and 90 A. L. R., 1397; 1 Greenleaf on Evidence (14th ed.), Section 195; 2 Wigmore on Evidence, Section 1066.

A reference to the bill in equity filed by the libelant in the Florida case discloses that he there contended, among other things, that "at the time of the said marriage ceremony his acts were brought about through the criminal prosecution and threats of further criminal

prosecution;" that he did not consent to the marriage, but that it "was brought about without his consent, through . . . duress and coercion."

While this bill was not signed by the libelant himself, but signed for him by his solicitor, yet the libelant must be deemed to have adopted the allegations just quoted as his own statement of the case, for they set forth the very foundation upon which his whole claim of duress and coercion rested, and upon which he actually prosecuted his case to final judgment.

In *City of Rockland* v. *Farnsworth*, 89 Me., 481, 484, 36 A., 989, the Court said:

> "The doctrine seems to be settled that pleadings in another suit may be used as admissions of the party, where they bear upon the material issues on trial and appear to have been made by his direction or adoption, shown 'by prosecuting the action upon them, as the foundation of his claim.'"

The libelant's testimony in the instant case, that he married the libelee *voluntarily* (although he claims that such voluntary action was induced by fraud), is plainly inconsistent with the contention that he did not consent to the marriage, which he says was brought about without his consent, through duress and coercion, as declared in his bill in equity filed in the Florida case.

Even if it should be assumed that in September, 1936, the libelant was convinced of the truth of the libelee's statement as to the paternity of the child, that he believed and relied on it when he agreed that he would marry her on October the fifteenth of that year, yet the record plainly discloses that he did not continue to believe it up to the time of their marriage on December 12, 1936.

After he talked with his father and mother, he broke off that engagement, and refused to go through with the marriage ceremony on October 15, because, he testified, "I doubted whether I was the father," and he wrote to the libelee, expressing his doubts to her. The libelee testified that "he wrote to me and asked me to prove to his father and mother that he was the father of the child." This he does not admit. In any event, before the birth of the child, the libelee wrote the libelant a letter, which he offered in evidence, and which reads, in part, as follows:

"Your letter did not hurt me since I am passed the stage where anything can hurt me.

"There is no way that I could prove anything if it has to be proved. Not even a blood test is a sure proof and that would be some time from now so we will just drop the subject . . ."

And, according to his own testimony, the libelant had decided, before his arrest on the bastardy warrant, that he would not marry the libelee. However, when he was arrested on December 12, 1936, before the birth of the child, he suddenly changed his mind and married her, a few hours after his arrest. It does not appear from the record that any new facts had come to light, or any new circumstances had presented themselves, between the time the libelant received that letter from the libelee and the time the bastardy warrant was issued, to cause him to change his mind. He still had that letter in which the libelee wrote: "There is no way that I could prove anything if it has to be proved," and yet he married her.

Nevertheless, it is argued for him that at the time of marriage he believed he was the father of the child, and the libelant himself testified as follows:

"Q. When did you become persuaded that you were the father of the child?
A. When I was served the warrant in Florida there.
Q. When you were served with a bastardy warrant in Florida?
A. Yes, sir.
Q. And why? What about that persuaded you?
A. Well, if I wasn't the father she wouldn't go to all the trouble, bringing it to law, and have me arrested."

The weight of this evidence was for the presiding justice (*Pettengill* v. *Shoenbar*, 84 Me., 104, 24 A., 584; *Sanfacon* v. *Gagnon*, 132 Me., 111, 113, 167 A., 695), and in passing upon it, he had the right to take into consideration not only the appearance of the libelant while on the witness stand, and his manner of testifying, but also the probability or improbability of his statement in the light of all the other facts and circumstances established by proof.

The credibility of the libelant was also for the trier of facts (*Bond* v. *Bond*, supra; *Sanfacon* v. *Gagnon*, supra). It was for him

to decide whether the libelant's testimony as to his belief in and reliance on the libelee's statement as to the paternity of the child, at the time of their marriage, truly disclosed the state of his mind at that time, or whether it merited unbelief. After a careful consideration of all of the evidence, we cannot say that the ruling of the court below on this point was erroneous.

A finding of fact, unsupported by evidence, not affecting the decision, is no ground for reversal. Even if the court erred as to the length of time the parties had been "keeping company," yet that would not affect the result here. There is no claim that they had sexual intercourse before the latter part of the month of April, 1936, and the libelant claims that it did not begin until about May 4 of that year. The libelant is not aggrieved by this finding.

The finding that the marriage has never been consummated, in the light of the record submitted, must be held to mean that the marriage has never been consummated by coition, but "coition is unnecessary in the case of a ceremonial marriage." *Brooks-Bischoffberger* v. *Bischoffberger*, 129 Me., 52, 149 A., 606.

The libelee testified positively that the libelant is the father of her child, and that she had had no sexual relations with any man other than the libelant, but the above-stated conclusions render it unnecessary to review her testimony, or that of the physicians, or to decide whether she gave birth to an eight-months child or a full-term child, or even to pass upon the question as to whether her statement as to the paternity of the child was true or false.

The libelant's exception to the effect that there was no substantial evidence upon which the judgment of the court could be based, and that there was no evidence or any inference which could be drawn from the evidence upon which to base a dismissal of the libel, cannot be sustained.

The libelant also excepts to the court's omission to make findings of fact, which had been asked for.

At the hearing, the libelant, in writing, requested that the "Court may in its decision and finding set forth fully and completely the reasons for the same and may make specific findings of fact upon the following points, and set forth the evidence upon which it bases its findings." This request was followed by a recital of six questions of fact, which need not be stated here, none of which were specifically answered.

In the absence of statute or rule of court, the presiding justice, sitting without a jury, is not required to make special findings of fact. *First National Bank* v. *Bank*, 152 Ill., 296, 301, 38 N. E., 739, 26 L. R. A., 289, 43 Am. St. Rep., 247; *Ashapa* v. *Reed*, supra; *James Elgar, Inc.* v. *Newhall*, 235 Mass., 373, at 377, 126 N. E., 661; *Katzeff* v. *Goldman et al.*, 248 Mass., 365, at 368, 142 N. E., 924; *Fred W. Mears Heel Co., Inc.* v. *Walley*, 71 Fed. (2d.), 876; see, also, comment on the common-law rule, in *Tilton* v. *Sharpe*, 84 N. H., 393, 151 A., 452.

Much less is he required to set forth the evidence upon which the findings were based, or to give in detail the reasons for decision rendered.

But, the libelant contends that he is entitled to findings of fact under the provisions of R. S., Chap. 91, Sec. 58, and Chap. 62, Sec. 63. He also relies on the case of *Hamilton et al.* v. *Caribou Water, Light & Power Co.*, 121 Me., 422, 117 A., 582. These citations are not in point.

Chapter 91, Sec. 58, requiring findings of fact when requested, is a statutory rule of practice in equity cases; while Chap. 62, Sec. 63, and *Hamilton et al.* v. *Caribou Water, Light & Power Company*, supra, deal with practice before the Public Utilities Commission; whereas the libel in the instant case is neither a proceeding in equity nor before the Public Utilities Commission, but is a purely statutory proceeding.

In 38 Corpus Juris, at page 1348, the general rule is laid down that:

> "The action for annulment is strictly an action neither at law nor in equity, being a proceeding sui generis originally cognizable in the ecclesiastical courts, and later, under common law, in the chancery courts in England. Unless otherwise provided by statute, the nullity proceeding in a state court should be by a bill in equity . . ."

But it is otherwise provided by statute in this state. A provision in the Maine Revised Statutes in the chapter dealing with divorces, reads as follows:

> "When the validity of a marriage is doubted, either party may file a libel as for divorce; and the court shall decree it

annulled or affirmed, according to proof . . ." R. S., Chap. 73, Sec. 15.

Proceedings for such an annulment are not brought in this state by a bill in equity, filed on the equity side of the court, but by a libel as for divorce for annulment of marriage as provided by statute. And since, by legislative enactment, the validity of a marriage is to be tested and determined at a hearing on a libel as for divorce, it follows that in such a proceeding the rules of practice in libels for divorce are to be followed so far as they are applicable. See *Piper* v. *Piper* (Wash.), 91 P., 189, 190.

A proceeding for annulment of marriage has been held to be a "divorce suit" under some statutes. *Foss* v. *Foss*, 12 Allen, 26, 27.

But surely a divorce suit is not a proceeding in equity. *Steele* v. *Steele*, 35 Conn., 48, 53.

Undoubtedly, equitable considerations prevail in hearing a libel as for divorce for annulment of marriage alleged to have been procured by fraud; but the application of equitable principles does not change the form of action. Equitable considerations prevail in some actions at law without converting the proceedings into equity cases.

In considering an action of assumpsit for money had and received, Mr. Justice Cornish, in *Dresser* v. *Kronberg*, 108 Me., 423, at 424, 81 A., 487, said:

> "Though the form of the procedure is in law it is equitable in spirit and purpose . . ."

It is well settled that trustee process is created and regulated by statute (*Hibbard* v. *Newman et al.*, 101 Me., 410, 414, 64 A., 720), but in *Harlow* v. *Bartlett et al.*, 96 Me., 294, at 296, 52 A., 638, Mr. Justice Whitehouse said:

> "A process of this kind, though in form an action at law, is in substance an equitable proceeding to determine the ownership of a fund in dispute."

And, in the same opinion, quoting from another case, he said:

> " 'As between the plaintiff and claimant equitable considerations must prevail so far as the nature of the process will admit.' "

So, in the instant case, "equitable considerations must prevail so far as the nature of the process will admit," but not to the extent of converting a libel as for divorce for annulment of marriage into a bill in equity to be governed by the rules of practice peculiar to equity.

Since the rules of practice in equity cases do not apply to a libel as for divorce for annulment of marriage, it follows that the provisions of Chap. 91, Sec. 58, requiring findings of fact to be made and filed in equity cases, when requested, has no application here. Much less do the rules of practice before the Public Utilities Commission apply, and therefore Chap. 62, Sec. 63, and the case of *Hamilton et al.* v. *Caribou Water, Light & Power Company*, supra, are not in point.

There being no statute or rule of court in this State requiring the presiding justice to make and file findings of fact in such a case as this, the libelant's exception on this point also, is overruled.

No point is made of the failure to affirm the marriage in the decree, but even if the point had been made, it would not have availed the libelant anything. While, according to the better practice, the marriage should have been affirmed (*Brooks-Bischoffberger* v. *Bischoffberger*, supra), yet the entry of "Libel dismissed," after a full hearing on the merits of the controversy, constituted a final judgment disposing of the case, and will bar further action between the same parties for the same cause, even although the statute was not literally followed. *Sargent, Petitioner*, supra.

It is unnecessary to consider the other exceptions because the conclusion at which we have arrived completely disposes of the case.

Exceptions overruled.

INHABITANTS OF FORT FAIRFIELD

vs.

INHABITANTS OF MILLINOCKET.

Aroostook. Opinion, April 1, 1940.

PAUPER AND PAUPER SETTLEMENT. EXCEPTIONS.

The question raised by the exception to the ruling by which the jury was ordered to return a verdict for the plaintiff is whether the jury would have been warranted by the evidence in finding a verdict contrary to the one ordered, and the issue raised by the exception is one of law in which the motion for a new trial has no office.

Where an exception to the denial of defendant's motion for a directed verdict and a general motion for new trial raised the same question, the exception was regarded as waived.

If error is found on defendant's exception to a directed verdict for plaintiff, the case goes back to nisi prius *to be tried* de novo *unless otherwise expressly decided and stated in the rescript.*

A town sued by another town for pauper supplies had burden of proving that pauper's derivative settlement in defendant town was defeated by his gaining a settlement in his own right in plaintiff town by having a home there for five successive years after he became of age without directly or indirectly receiving pauper supplies.

The care and relief of the poor chargeable to a town and the furnishing of relief to destitute persons found there and having no settlement in the town are expressly committed to the overseers of the poor of the several towns and cities of the state and the overseers must be sworn to the faithful performance of their duties.

The powers with which overseers are clothed require an exercise of judgment by which they may charge their towns with the support of paupers. They are bound to act in good faith and with reasonable judgment regarding the necessity for and the nature and extent of relief furnished. The relief must be reasonable and proper under the circumstances and this, in the first instance, must be left to their sound and honest discretion. As officers sworn to do their duty, it is presumed they act with integrity and their conclusions will be respected in law.

The general rule is that the discretionary powers and duties of overseers of the poor are quasi judicial and can not be delegated to others. This rule has been varied in this state only to the extent that it has been settled by a long line of decisions that the overseers of the poor need not act at all times as a body, but that one overseer may furnish poor relief by the express authority of the other overseers and his act, although not authorized, may become the action of the board if approved or ratified.

Overseers of the poor can not delegate the exercise of their discretionary powers to persons not on the board and the provisions of Chapter 65, *Private and Special Laws,* 1929, *which authorize the Town of Fort Fairfield to adopt a town manager form of government and empowered its overseers of the poor to authorize its town manager to act as their clerk or agent to send pauper notices and answers, is not in conflict with this view. The overseers of the poor are not given authority in that statute to delegate their discretionary powers and duties to the town manager or anyone else. The sending of notices and answers is simply a ministerial function. Such ministerial functions may be delegated to an agent or clerk by overseers of the poor.*

On exceptions and motion for new trial. Action by the Inhabitants of Fort Fairfield against the Inhabitants of Millinocket to recover the cost of pauper supplies. Defendant moved for directed verdict after introduction of plaintiff's evidence. Motion for directed verdict denied. Defendant filed exceptions. Jury was directed to return verdict for plaintiff and defendant noted exception. General motion for new trial filed by defendant. Exception to order for directed verdict for plaintiff sustained. Exception to refusal to direct a verdict for defendant dismissed. Motion for a new trial dismissed. Case fully appears in the opinion.

A. F. Cook,
Herschel Shaw, for plaintiff.
John F. Ward,
Michael Pilot, for defendant.

SITTING: BARNES, C. J., STURGIS, THAXTER, HUDSON, MANSER, WORSTER, JJ.

STURGIS, J. In this pauper suit, the defendant rested its case on the evidence introduced by the plaintiff and moved for a directed verdict. This was denied and exception reserved. The jury then, under instructions, returned a verdict for the plaintiff and excep-

tion to that ruling was noted. The case comes forward on these exceptions and a general motion for a new trial on the usual grounds.

The question raised by the exception to the ruling by which the jury was ordered to return a verdict for the plaintiff is whether the jury would have been warranted by the evidence in finding a verdict contrary to the one ordered. *Healy* v. *Cumberland County Power & Light Co.*, 125 Me., 519, 134 A., 544; *Royal* v. *Bar Harbor and Union River Power Co.*, 114 Me., 220, 95 A., 945. The issue raised by the exception is one of law in which the motion for a new trial has no office. *Rhoda* v. *Drake, Jr.*, 125 Me., 509, 131 A., 573. The exception taken to the denial of the defendant's motion for a directed verdict and the general motion for a new trial raise the same question. That exception must be regarded as waived. *Symonds* v. *Free Street Corporation*, 135 Me., 501, 200 A,. 801. The case must be decided on the exception to the directed verdict for the plaintiff. If error is found, the case goes back to *nisi prius* to be tried *de novo* unless otherwise expressly decided and stated in the rescript. *Bean* v. *Ingraham*, 128 Me., 462, 148 A., 681.

The record shows that one Walter L. Walls, while still a minor, moved into Fort Fairfield, married a few days later, and since, with his wife and the children born of the union, has lived in that town. He and his family have been in distress more or less continuously in the last few years and have been furnished with a substantial amount of pauper supplies by Fort Fairfield. The full amount of the expense incurred for these supplies is set forth in the account annexed in the writ, but it is stipulated that if recovery can be had in this action it is limited to $639.61, the cost of the supplies furnished during the three months prior to February 7, 1938, when a pauper notice was sent to the Town of Millinocket, and up to the commencement of this action. This is in accordance with the statute. R. S., Chap. 33, Sec. 29; see *Fayette* v. *Livermore*, 62 Me., 229, 234.

The pauper was born in New Brunswick, came to Millinocket with his father and mother when he was three years old and lived with them there until he went to Fort Fairfield. He became of age August 24, 1928, and at that time took a derivative settlement from his father in Millinocket. R. S., Chap. 33, Sec. 1, Par. II; *Gouldsboro* v. *Sullivan*, 132 Me., 342, 170 A., 900; *Eagle Lake* v. *Fort Kent*, 117 Me., 134, 103 A., 10; see *Belmont* v. *Morrill*, 73 Me., 231. The de-

fense is that the pauper's derivative settlement in Millinocket was defeated by his gaining a settlement in his own right in Fort Fairfield by having a home there for five successive years after he became of age without directly or indirectly receiving pauper supplies. R. S., Chap. 33, Sec. 1, Par. VI. The burden of sustaining this proposition is on the defendant. *Gouldsboro* v. *Sullivan*, supra; *Ellsworth* v. *Waltham*, 125 Me., 214, 132 A., 423; *Monroe* v. *Hampden*, 95 Me., 111, 49 A., 604.

The record further shows that on June 21, 1933 and less than five years after Walter L. Walls beame twenty-one years old, he and his family being destitute, he went to the selectmen's office in Fort Fairfield and finding there William B. Burns, erroneously called in the record Leon D. Burns, who was a relief worker employed by the selectmen, asked for assistance and was given an order on Kyle & Spear, local grocers, for merchandise. The relief worker Burns signed the order:

D. M. ALLEN
B
TOWN MANAGER.

The grocers furnished the merchandise to the applicant for relief and their bill, when presented at the end of the month to the Treasurer of Fort Fairfield, was paid.

As a witness, William B. Burns testified that in March, 1933, he was employed by the Selectmen of Fort Fairfield to look after relief and thereafter issued orders to the poor under the name of D. M. Allen, the town manager, with his own initial attached. He states that he does not know that he had authority to issue the order which was given to Walter L. Walls and that he was "a relief worker only." He was not supervised by anybody, only conferring with the town manager when he had questions to ask. The order for supplies in controversy, which he gave to this pauper, was never discussed with the town manager or the overseers of the poor and was reported only by presentation of the grocers' bill to the town treasurer. In so far as the record discloses, no member of the overseers of the poor of Fort Fairfield expressly authorized or has since ratified the issuance of this order or had personal knowledge that pursuant to it supplies were furnished and paid for by the town.

The care and relief of the poor chargeable to a town and the furnishing of relief to destitute persons found there and having no settlement in the town are expressly committed to the overseers of the poor of the several towns and cities of the state. R. S., Chap. 33, Sec. 10 & 29. The overseers must be sworn to the faithful performance of their duties. R. S., Chap. 5, Sec. 12. "The powers with which overseers are clothed require an exercise of judgment by which they may charge their towns with the support of paupers." They are bound to act in good faith and with reasonable judgment regarding the necessity for and the nature and extent of relief furnished. The relief must be reasonable and proper under the circumstances and this, in the first instance, must be left to their sound and honest discretion. As officers sworn to do their duty, it is presumed they act with integrity and their conclusions will be respected in law. *Harpswell* v. *Phipsburg*, 29 Me., 313, 316; *Portland* v. *Bangor*, 42 Me., 403; *Hutchinson* v. *Carthage*, 105 Me., 134, 73 A., 825; *Bishop* v. *Hermon*, 111 Me., 58, 88 A., 86; *Machias* v. *East Machias*, 116 Me., 424, 102 A., 181; *Hartland* v. *St. Albans*, 123 Me., 82, 121 A., 552.

The general rule is that the discretionary powers and duties of overseers of the poor are quasi judicial and can not be delegated to others. 21 Ruling Case Law, 707. This rule has been varied in this state only to the extent that it has been settled by a long line of decisions that the overseers of the poor need not act at all times as a body, but that one overseer may furnish poor relief by the express authority of the other overseers and his act, although not authorized, may become the action of the board if approved or ratified. *Carter* v. *Augusta*, 84 Me., 418, 24 A., 892; *Fairfield* v. *Oldtown*, 73 Me., 577; *Linneus* v. *Sidney*, 70 Me., 114; *Smithfield* v. *Waterville*, 64 Me., 412; *Fayette* v. *Livermore*, 62 Me., 229; *Windsor* v. *China*, 4 Me., 298; see also *Boothby* v. *Troy*, 48 Me., 560; *Mt. Desert* v. *Bluehill*, 118 Me., 293, 108 A., 73. It has never been held here or elsewhere, so far as research discloses, that overseers of the poor can delegate the exercise of their discretionary powers to persons not on the board. The provisions of Chapter 65, Private and Special Laws, 1929, which authorized the Town of Fort Fairfield to adopt a town manager form of government and empowered its overseers of the poor to authorize its town manager to act as their clerk or agent to send pauper notices and answers, is not in conflict with this

view. The overseers of the poor are not given authority in that statute to delegate their discretionary powers and duties to the town manager or anyone else. The sending of notices and answers is simply a ministerial function. Such ministerial functions may be delegated to an agent or clerk by overseers of the poor. *Sullivan* v. *Lewiston*, 93 Me., 71, 44 A., 118.

It must be held, therefore, that the receipt of supplies by Walter L. Walls and his family on June 21, 1933, through the order of William B. Burns, the relief worker of Fort Fairfield, did not constitute a direct or indirect receipt of pauper supplies which prevented his gaining a settlement in Fort Fairfield by having his home there for five successive years after he became of age. The furnishing of these supplies was, in the first instance, unauthorized. If the overseers of the poor had power to ratify the act of the relief worker, there is not a scintilla of proof in the record that they have ever actually done so or had knowledge that the supplies were furnished. The presumptions arising out of the payment to the grocer for the supplies by the town treasurer and from the fact that a pauper notice was sent to Millinocket February 7, 1938, nearly five years after the supplies in controversy were furnished, can not prevail against the lack of ratification clearly indicated by the proven facts. Apparently the town treasurer paid the supply bill without the knowledge of the overseers of the poor and, on the record, the town manager sent out the pauper notice on his own responsibility and of this the overseers had no knowledge. It can not be held that the Town Manager of Fort Fairfield has the power to effect a ratification by the overseers of the poor of an unauthorized administration of their discretionary duties under the pauper law by an employee, especially when such administration is to them unknown.

On the evidence in this case, a verdict for the defendant was clearly warranted. The direction of a verdict for the plaintiff, therefore, was error. The entry must be

Exception to order for directed verdict for plaintiff sustained.

Exception to refusal to direct a verdict for defendant dismissed.

Motion for a new trial dismissed.

STATE OF MAINE *vs.* GEDEON VALLEE.

Androscoggin. Opinion, April 9, 1940.

CRIMINAL PLEADINGS. BRIBERY. FALSE PRETENSES.

The 1857 revision of the statute punishing bribery and acceptance of bribes by public officers did not change original effect of statute, there being nothing to show such a legislative intention.

The law, originally and now, intends to condemn, not only the actual acceptance of bribe money, but the acceptance of a promise to pay such money in order to induce corrupt action by an official.

Generally speaking under bribery statutes there need not be mutual intent on the part of both the giver and the accepter. It is enough that the person accused had the guilty intent.

The guilt of an accused is not measured by the intent of another, but by his own intent.

When a crime is not a continuing offense, it must be charged as committed upon a definite day. The inclusion of a continuando is neither necessary nor in accord with proper pleading. Such inclusion, however, is not fatal to the indictment, since continuando may be treated as surplusage.

"Extortion," in its general sense, signifies any oppression by color of right; but technically it may be defined to be the taking of money by an officer, by reason of his office, either where none is due, or where none is yet due.

The gist of the crime of extortion lies, not in the nature of the threat, but in the intent to extort money.

A contract of employment, even though terminable without notice, still, while existing, furnishes to the employee his means of livelihood. The courts have recognized that the right to contract for one's labor, the right to one's employment free from unwarranted interference, is a sacred property right.

Under an indictment charging extortion, an allegation that property intended to be injured was a contract of employment between a certain individual and a county was sufficiently particular.

The gravamen of the offense punishable by statute concerning extortion is an intent to extort money, and the threat is the manner in which this is to be accomplished.

Under existing statutes as to cheating by false pretenses, it is made indictable to obtain money or goods from individuals by any designedly false statements of facts likely, under the particular circumstances of the case, to deceive.

County Commissioners derive their powers and duties entirely from the statutes.

The respondent is entitled to know, not by implication or intendment, but by direct averment, whether he is accused of misrepresenting the law or of misstating a fact.

On exceptions. Respondent was charged, by three indictments, with the acceptance of a promise to pay money as a bribe and the actual acceptance of money bribes, and with extortion and cheating by false pretenses. On exceptions, with right to plead anew, after general and special demurrers were filed and overruled. Exceptions overruled as to indictments for bribery and extortion, and sustained as to indictment for cheating by false pretenses. Case fully appears in the opinion.

Edward J. Beauchamp, County Attorney.

Armand A. Dufresne, Jr., Assistant County Attorney (on the brief), for the State.

Berman & Berman (Lewiston, Maine),

Adrian A. Cote, for respondent.

SITTING: DUNN, C. J., STURGIS, THAXTER, HUDSON, MANSER, JJ.

BARNES, C. J. To three indictments against the respondent, general and special demurrers were filed and overruled. The cases come forward on one record on exceptions with right to plead anew.

The first indictment is in three counts. The first count alleges the acceptance of a promise to pay money as a bribe. The other two allege the actual acceptance of money bribes.

The second indictment is for extortion.

The third indictment is for cheating by false pretenses.

In all, forty-three causes of demurrer are assigned to the various indictments, but several are abandoned.

All three cases arise from circumstances under which a janitor was appointed for the county building in Androscoggin County. The respondent is a County Commissioner, and it is alleged by the State that, for his instrumentality in securing the appointment and

retention of one St. Pierre as janitor, he received his promise and the subsequent payment of $5 per week as a bribe. The indictments for extortion and cheating by false pretenses have to do with the acts and conduct of the respondent in procuring the payment of money from St. Pierre.

Although in some instances, the same or similar objections were raised to the various counts, counsel for the defense, perhaps with propriety, have treated each count and each indictment separately. Counsel for the State have arranged the causes of demurrer in groups, and the Court, in considering the questions raised, finds it advantageous to follow such groupings. The bribery indictment is as follows:

"The jurors for said state upon their oath present that Gedeon Vallee, of Lewiston, in the County of Androscoggin, on December 31, 1934, at said Lewiston, in the County of Androscoggin, was a duly and legally elected and qualified executive officer, to wit, a County Commissioner, for the County of Androscoggin; that as such County Commissioner, he, the said Gedeon Vallee, was then and there by law charged with the management and control of the Androscoggin County Building, located at Auburn, in said County of Androscoggin, and especially with the selection and appointment of suitable persons to act as janitors and otherwise in the care, maintenance, and upkeep of said buildings; that he, the said Gedeon Vallee, on said December 31, 1934, at said Lewiston, was promised by one Alfred St. Pierre a certain sum of money, to wit, the sum of five dollars per week during said time as said Alfred St. Pierre would be acting as janitor in said Androscoggin County Building as aforementioned, the said Alfred St. Pierre having then and there, to wit, at Lewiston, on said December 31, 1934, the full knowledge that the said Gedeon Vallee was a duly and legally elected and qualified Commissioner for the County of Androscoggin, and having the intent to influence the action of the said Gedeon Vallee, in the matter of the selection and appointment of a janitor in said Androscoggin County Building, a matter which was to come legally before him, the said Gedeon Vallee, in his official capacity as County Commissioner for the

said County of Androscoggin; that the said Gedeon Vallee, on said December 31, 1934, at said Lewiston, perverting the trust reposed in him, feloniously did accept, agree and consent to said promise of the said Alfred St. Pierre, to wit, feloniously did agree to receive from the said Alfred St. Pierre the sum of five dollars per week, during said time as said Alfred St. Pierre would be acting as janitor in said Androscoggin County Building as aforementioned, the said Gedeon Vallee, having then and there, to wit, at said Lewiston, on said December 31, 1934, the intent to comply with said acceptance and agreement, and having then and there, to wit, at said Lewiston, on said December 31, 1934, the intent, under the influence of the said promise by the said Alfred St. Pierre as aforesaid, to vote for the said Alfred St. Pierre as janitor in the said Androscoggin County Building as aforementioned, a matter which was to come legally before him, the said Gedeon Vallee, in his official capacity against the peace of said State, and contrary to the form of the statute in such case made and provided.

"The jurors for said state upon their oath further present that Gedeon Vallee, of Lewiston in the County of Androscoggin, on December 31, 1934, at said Lewiston, in the County of Androscoggin, was a duly and legally elected and qualified executive officer, to wit, a County Commissioner, for the County of Androscoggin; that as such County Commissioner, he, the said Gedeon Vallee, was then and there by law charged with the management and control of the Androscoggin County Building, located at Auburn, in said County of Androscoggin, and especially with the selection and appointment of suitable persons to act as janitors and otherwise in the care, maintenance, and upkeep of said building; that he, the said Gedeon Vallee, on said December 31, 1934, at said Lewiston, was promised by one Alfred St. Pierre a certain sum of money, to wit, the sum of five dollars per week, during said time as said Alfred St. Pierre would be acting as janitor in said Androscoggin County Building as aforementioned, the said Alfred St. Pierre having then and there, to wit, at Lewiston, on said December 31, 1934, the full knowledge that the said Gedeon Vallee was a duly and legally elected and qualified

Commissioner for the County of Androscoggin, and having the intent to influence the action of the said Gedeon Vallee, in the matter of the selection and appointment of a janitor in said Androscoggin County Building, a matter which was to come legally before him, the said Gedeon Vallee, in his official capacity as a County Commissioner for the County of Androscoggin; that the said Gedeon Vallee, on said December 31, 1934, at said Lewiston, perverting the trust reposed in him, feloniously did accept, agree, and consent to, said promise of the said Alfred St. Pierre, to wit, feloniously did agree to receive from the said Alfred St. Pierre, the sum of five dollars per week, during said time as said Alfred St. Pierre would be acting as janitor in said Androscoggin Building as aforementioned, the said Gedeon Vallee having then and there, to wit, at said Lewiston, on said December 31, 1934, the intent to comply with said acceptance and agreement, and having then and there, to wit, at said Lewiston, on said December 31, 1934, the intent, under the influence of the said promise by the said Alfred St. Pierre as aforesaid, to vote for the said Alfred St. Pierre as janitor of the Androscoggin County Building aforementioned, a matter which was to come legally before him, the said Gedeon Vallee, in his official capacity; that, on January 2, 1935, at Auburn, the said matter aforementioned did come legally before the said Gedeon Vallee, in his official capacity as County Commissioner for the said County of Androscoggin, and that the said Alfred St. Pierre was legally selected and appointed janitor in said Androscoggin County Building; that the said Alfred St. Pierre, on January 12, 1935, and on divers other days and times between that day and the time of the finding of this indictment, while he, the said Alfred St. Pierre, was acting as janitor in said Androscoggin County Building, did give to the said Gedeon Vallee, a certain sum of money, to wit, the sum of five dollars, and the said Gedeon Vallee, then and there, to wit, on said January 12, 1935, and on divers other days and times between that day and the time of the finding of this indictment, perverting the trust reposed in him, feloniously did receive said sum of money, the sum of five dollars, in pursuance of said corrupt agreement existing between him, the said

Gedeon Vallee, and the said Alfred St. Pierre, against the peace of said State, and contrary to the form of the statute in such case made and provided.

"And the Jurors for said state upon their oath further present that Gedeon Vallee, of Lewiston, in the County of Androscoggin, on January 12, 1935, at Auburn, in the said County of Androscoggin, was a duly and legally elected and qualified executive officer, to wit, a County Commissioner for said County of Androscoggin; that as such County Commissioner, he, the said Gedeon Vallee, was then and there by law charged with the management and control of the Androscoggin County Building, located at said Auburn, in said County of Androscoggin, and especially with the selection and appointment of suitable persons to act as janitors and otherwise in the care, maintenance, and upkeep of said building; that he, the said Gedeon Vallee, on said January 12, 1935, and on divers other days and times between that day and the time of the finding of this indictment, at said Auburn, perverting the trust reposed in him, feloniously did accept a certain sum of money, to wit, the sum of five dollars from one Alfred St. Pierre; the said Gedeon Vallee, under the influence and in consideration of said payment of money by the said Alfred St. Pierre, having the intent, then and there, to keep by his vote, the said Alfred St. Pierre, in the employment of the County of Androscoggin, as janitor, when the matter of selecting and appointing janitors in the Androscoggin County Building might legally come before him, the said Gedeon Vallee, in his official capacity as County Commissioner for the County of Androscoggin, against the peace of said State, and contrary to the form of the statute in such case made provided."

All three counts are objected to as being ambiguous, uncertain, indefinite, vague and obscure, and particularly, that uncertainty exists as to whether each count is drawn under R. S., Chap. 133, Sec. 5 or Sec. 6.

Further, Counts 1 and 2 are alleged to be bad for duplicity as attempting to set forth the crime of bribery under Sec. 5 and the crime of corrupt solicitation under Sec. 6. Sec. 5 is applicable to executive, legislative or judicial officers. Sec. 6 applies to persons

not included in the preceding section. Counsel recognize that the indictment in all counts alleges the respondent to be an executive officer, and acknowledge that the allegations bring it clearly within Sec. 5, but then assert that Counts 1 and 2 allege only the acceptance of a promise, and that such acceptance is not a criminal act under the provisions of Sec. 5, while it is under Sec. 6.

The determination of whether the acceptance of a promise as here alleged is a criminal act, is made plain by a consideration of the statute as originally enacted and since condensed in later revisions. In R. S. 1840, Chap. 158, Secs. 6 and 7, the provisions as to bribery are set forth in separate paragraphs, first, as to bribery by the giver, and second, as to bribery by the taker. The two sections were combined in the revision of 1857. The section with reference to bribery by the taker, as it originally read, was:

> "Sect. 7: If any executive, legislative or judicial officer shall corruptly accept any valuable consideration or gratuity whatever, or *any promise to make the same*, or to do any act beneficial to such officer, under the agreement, or with the understanding, that his vote, opinion, decision or judgment, shall be given in any particular manner, or upon a particular side of any question, cause or other proceeding, which is, or may, by law, be brought before him in his official capacity, or that, in such capacity, he shall make any particular nomination, or appointment," etc. (Prescribing punishment.)

Under the present statute as condensed, "whoever gives, offers or promises to an executive . . . officer . . . or does, offers or *promises to do any act beneficial* to such officer," is guilty of bribery, and "whoever accepts such bribe or *beneficial thing*, in the manner and for the purpose aforesaid," is likewise guilty of bribery. The revision of the statute in 1857 by condensation, did not change its original effect. There is nothing to show such a legislative intention. *Hughes* v. *Farrar*, 45 Me., 72; *Densmore* v. *Hall*, 109 Me., 438, 84 A., 983; *State* v. *Holland*, 117 Me., 288, 104 A., 159; *Tarbox* v. *Tarbox*, 120 Me., 407, 115 A., 164. The law, originally and now, intends to condemn, not only the actual acceptance of bribe money, but the acceptance of a promise to pay such money in order to induce corrupt action by an official.

All counts in the first indictment are drawn under Sec. 5, but one crime is charged, and there is no duplicity.

Another analogous cause of demurrer is to the effect that Count 1 did not set forth any crime, contention being that an agreement to accept money to be paid in the future is not a crime. This might have been included in the former category, but a further point is made that there was no allegation of a promise of value. The charge that the respondent accepted the promise to pay him $5 per week as a bribe, is the acceptance of a "bribe or beneficial thing." Again, it is unnecessary to enlarge, as the point is fully covered above.

Two assigned causes of demurrer object that in Count 1 there is no allegation of a specific intent on the part of the respondent to accept a bribe or beneficial thing with intent that his action, vote, opinion or judgment be influenced.

In the opinion of the Court, the pleader took extreme care to link together the acceptance of a bribe with the corrupt intention that respondent's action would be influenced thereby. The statute as to a bribe taker provides that:

> "Whoever accepts such bribe or beneficial thing, in the manner and for the purpose aforesaid."

The "manner and purpose" refer to the preceding portion of the section with reference to the bribe giver, which provides:

> "Whoever . . . does, offers or promises to do, any act beneficial to such officer, with intent to influence his action, vote, opinion or judgment," etc.

The indictment charges that the respondent "did accept, agree and consent to, said promise of the said Alfred St. Pierre . . . having then and there, to wit, at said Lewiston, on said December 31, 1934, the intent to comply with said acceptance and agreement, and having then and there . . . the intent, under the influence of the said promise by the said Alfred St. Pierre as aforesaid, to vote for the said Alfred St. Pierre as janitor." Nothing is left to implication or intendment.

The respondent directs another cause of demurrer to each one of the three counts in the bribery indictment. It is, in effect, that there is failure to allege a mutual intention on the part of the giver and

taker of the bribe. It is true that, in some jurisdictions, the act of at least two persons is essential to bribery, and it must be proved that the minds of the two concur. 8 Am. Jur., Bribery, Sec. 10, citing *People* v. *Peters*, 265 Ill., 122, 106 N. E., 513, and the annotation in 52 A.L.R., 821. Generally speaking, however, under bribery statutes there need not be mutual intent on the part of both the giver and the accepter. It is enough that the person accused had the guilty intent. 8 Am. Jur., Bribery, Sec. 6. The historical background of our statute shows that originally the crime of bribery by the giver and the accepter was defined in two separate sections. In each, the corrupt intent on the part of the person accused, is a necessary element, but guilt is not made to depend upon the mutual intent of both parties. The interpretation of similar statutes is well illustrated in *Commonwealth* v. *Murray*, 135 Mass., 530, and under a statute similar to ours, the court in *Minter* v. *State* (Tex.), 159 S. W., 286 at 302, states the rule:

> "The guilt of an accused is not measured by the intent of another, but by his own intent."

The charge here is against the accepter and his intent is specifically and definitely alleged. The allegations of intent in the giver may furnish an aid to a better understanding of the charge against the accepter, but are not necessary or vital.

Similarly, four other causes of demurrer are based upon the same contention that the intent of the bribe giver, while couched in the language of the statute, is stated in generic terms, and does not allege the manner in which it was intended to influence the action of the respondent. These causes are directed to all three counts of the indictment. They have already been sufficiently considered in the preceding paragraph, and are found to be without merit.

A specific cause of demurrer to the second count of the indictment, challenges the efficacy of the pleading with reference to the payment of the sum of $5 on January 12, 1935, and its receipt by the respondent "in pursuance of said corrupt agreement existing between him, the said Gedeon Vallee, and the said Alfred St. Pierre." It is asserted that this is not a sufficient allegation of criminal intent. This count sets up, first, the acceptance of a promise made on December 31, 1934, of $5 per week as a bribe for official action to be

taken by the respondent in favor of the giver for his appointment as janitor; second, that on January 2, 1935, the respondent, corruptly motivated by this promise and its acceptance, was instrumental in procuring such appointment. The crime alleged against the respondent is thereby sufficiently set forth. The rest of the count amounts to a statement that the respondent received the fruits of his corrupt act. If it were necessary to rely upon definite averment of criminal intent in connection with the receipt of the money, the objection would have merit. Such intention is not clearly and distinctly alleged. The respondent under the pleadings is not called upon to answer to the charge of a distinct crime occurring on January 12, 1935. That portion of the count is to be regarded as a description of facts connected with, but subsequent to, the crime charged.

Further objection is made that three dates are set forth in Count 2, rendering indefinite and obscure the time of the commission of the criminal act. December 31, 1934, is the date alleged that the respondent accepted the promise of the bribe. January 2, 1935, is the date alleged when he fulfilled the terms of the bribe offer and its acceptance. These have relevancy. They refer to separate specific acts connected with the crime and leave no uncertainty as to time, of which the respondent can complain. As above stated, the date of January 12, 1935, merely describes the time when the first money was paid.

In connection with allegations referring to acts occurring on January 12, 1935, Count 2 of the indictment continues:

> "And on divers other days and times between that day and the time of the finding of this indictment, while he, the said Alfred St. Pierre, was acting as janitor in said Androscoggin County Building, did give to the said Gedeon Vallee a certain sum of money, to wit, the sum of five dollars."

It is objected that this allegation of time is set forth by way of continuando, and the crime alleged is not in its nature a continuous one. We have pointed out that the averment with reference to the occurrences of January 12, 1935, and thereafter are not to be regarded as allegations of a distinct crime. It becomes unnecessary, therefore, to consider the use of the continuando in connection with

that date. In any event, the objection is without avail. The rule has been stated in *State* v. *Martel*, 124 Me., 359, 129 A., 226, 227, that when the crime is not a continuing offense, it must be charged as committed upon a definite day. The inclusion of a continuando is neither necessary nor in accord with proper pleading. Such inclusion, however, is not fatal to the indictment, for as held in the last cited case:

> "By the weight of authority, the continuando may be treated as surplusage and rejected, leaving the offense stated with that degree of certainty which the law requires."

All causes of demurrer to the three counts of the bribery indictment are found to be without merit, and the indictment is adjudged sufficient.

The second indictment is for extortion, as follows:

> "The jurors for said state upon their oath present that Gedeon Vallee, of Lewiston, in the County of Androscoggin, on January 12, 1935, and on divers other days and times between that day and the time of the finding of this indictment, at Auburn, in the County of Androscoggin, verbally, maliciously did threaten one Alfred St. Pierre to injure the property of the said Alfred St. Pierre, to wit, the contract of employment between the said Alfred St. Pierre and the County of Androscoggin, with intent thereby to extort a certain sum of money, to wit, the sum of five dollars, from him, the said Alfred St. Pierre, against the peace of said State, and contrary to the form of the statute in such case made and provided."

This indictment is evidently drawn under R. S., Chap. 129, Sec. 22.

> "Extortion, in its general sense, signifies any oppression by color of right; but technically it may be defined to be the taking of money by an officer, by reason of his office, either where none is due, or where none is yet due." 3 Wharton, Criminal Law, 11th Ed., Sec. 1895.

Two objections as to allegation of specific time and as to the use of continuando in the indictment, were likewise raised against the bribery indictment, and are based upon the same grounds and for

the reasons heretofore given, are found to be without merit.

The respondent further complains that the allegation of a threat "to injure the property of Alfred St. Pierre, to wit, the contract of employment between the said Alfred St. Pierre and the County of Androscoggin," does not set forth any crime, upon the ground that such contract of employment is not property. It is true, the nature and terms of the employment are not elaborated. The gist of the crime lies, not in the nature of the threat, but in the intent to extort money. *State* v. *Robinson*, 85 Me., 195, 27 A., 99; *State* v. *Blackington*, 111 Me., 229, 88 A., 726. A contract of employment, even though terminable without notice, still, while existing, furnishes to the employee his means of livelihood. The courts have recognized that the right to contract for one's labor, the right to one's employment free from unwarranted interference, is a sacred property right. It was held in *Perkins* v. *Pendleton et al.*, 90 Me., 166, 38 A., 96, that, if a person wrongfully procures the discharge of a servant from his employment, which, but for such wrongful interference, would have continued, he is liable to damages. This principle is affirmed in *Taylor* v. *Pratt*, 135 Me., 282, 195 A., 205. The allegation that the property intended to be injured was a contract of employment, is sufficiently particular. In *State* v. *Robinson*, supra, in the first count of an indictment, the threat alleged was to accuse and prosecute the said J. H. of having committed the crime of assault and battery upon him, the said G. H. R. The Court held:

> "We think the first count sufficient. It is a matter where considerable generality of allegation is permissible. The same rule of strictness does not apply as in actions or indictments for libel, a class of prosecutions not very much favored by the law. The gist of the present offense is the malicious threat made to extort money."

The holding of the Court in the above case, and also in *State* v. *Blackington*, supra, negatives the further objection raised by the respondent that the indictment is defective for the reason that it does not set forth the manner in which the respondent was to injure the property of Alfred St. Pierre. Essentially, complaint is that the language used, indicating how the threat was to be accom-

plished, is not set forth. In *State* v. *Blackington*, supra, cited by counsel, on both sides, the Court held:

> "The form of the language, in which the threat was made, is not material. If required to be set out, it might defeat the very purpose of the statute. . . . The statute never intended the words should be alleged as in the case of libel or slander."

We hold, as applicable to the present case, the further ruling in *State* v. *Blackington*, supra:

> "The gravamen of the charge contained in this statute is an intent to extort money. The threat is the manner in which this is to be accomplished. We think the present indictment is sufficient. It specifically alleged the offense charged, and apprised the respondent of what he was accused—an intent to extort money."

Finally, objection is made that, although the indictment follows the language of the statute, it alleges only a conclusion not setting forth any act which the respondent threatened to do. This contention has already been fully answered and is without merit. The indictment for extortion is found to be sufficient.

The third indictment against the respondent is for cheating by false pretenses. It is drawn under R. S., Chap. 138, Sec. 1. So far as it is necessary to consider the allegations of the indictment, it, in effect, charges that for the purpose of inducing Alfred St. Pierre, an employee of the County of Androscoggin, to pay him the sum of $5, the respondent, falsely pretending that in his capacity as a County Commissioner, he had the "individual right and authority to release the said Alfred St. Pierre from his contract of employment with the County of Androscoggin," and thereby St. Pierre was deceived and induced to pay said sum to retain his job.

Counsel for the respondent present but two of the six causes of demurrer originally assigned. Granting that the false pretense, if made, was morally inexcusable, contention is that the misrepresentation alleged is one of domestic law and not of fact. The principle is generally accepted by the authorities that, under existing statutes as to cheating by false pretenses,

"It is made indictable to obtain money or goods from individuals by any designedly false statements of facts likely, under the particular circumstances of the case, to deceive." Wharton, Criminal Law, 11th ed., Vol. 2, Sec. 1393.

Under the title, "Misrepresentation as to Matters of Law," 22 Am. Jur., False Pretenses, Sec. 17, we find:

"The crime of false pretense, as it exists under modern statutes, may be committed by a misrepresentation. On the theory that a misrepresentation as to a matter of law cannot constitute remedial or actionable fraud, it has been held that a misrepresentation relating to a matter of law does not constitute the crime of false pretenses."

In the civil action of *Thompson* v. *Ins. Co.*, 75 Me., 55, it was held that:

"If the declarations of the agent of the insurance company are regarded as statements of the law of insurance, of the legal conditions on which the right of recovery in such cases depends, they are not actionable, though false."

In *State* v. *Jamison*, 186 S. W. (Mo.), 972, the Court said:

"Coming back to the question of false pretenses, we are impelled to hold that no felony can be committed in this state by falsely or mistakenly representing the domestic law to be that which it is not. . . . This conclusion is in line with the rule in other jurisdictions even in civil cases, wherein the rule against pretenses of the sort here under discussion ought to be more strictly construed against the tort-feasor than in a criminal case."

In *Fish* v. *Cleland*, 33 Ill., 237, is found the following:

"A representation of what the law will or will not permit to be done, is one upon which the party to whom it is made has no right to rely and if he does so, it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."

The County Commissioners derive their powers and duties entirely from the statutes. *Selectmen of Ripley, Aplts.*, 39 Me., 350; *Prince* v. *Skillin*, 71 Me., 361; *Inh. of Belfast, Aplts.*, 52 Me., 529.

Revised Statutes, Chap. 92, provides for a board of County Commissioners for each county, consisting of a chairman and two other citizens, resident in the county. Section 5 provides for regular sessions of the board. Section 7 provides that two Commissioners shall constitute a quorum. The person alleged to have been deceived is charged with knowledge that there are three County Commissioners, that they must act as a board, that no individual member has a right to make decisions respecting matters under the jurisdiction of the board; that separate, unauthorized or unconfirmed action of one is without legal effect. The indictment contains no allegation that the County Commissioners had undertaken to delegate to the respondent the right and authority to determine, according to his own judgment, whether the employment of St. Pierre should be continued or terminated. The averment is simply "that he *had* the individual right and authority to release the said Alfred St. Pierre." The respondent is entitled to know, not by implication or intendment, but by direct averment, whether he is accused of misrepresenting the law or of misstating a fact. As set out in the indictment, it is limited to a misstatement of the law.

The indictment for cheating by false pretenses is held to be insufficient.

In Case 2665, *all counts in indictment for bribery adjudged good. Exceptions overruled.*

In Case 2666 *indictment for extortion adjudged good. Exceptions overruled.*

In Case 2667, *indictment for false pretenses adjudged bad. Exceptions sustained.*

(DUNN, C. J., having deceased, did not join in this opinion.)

JAMES H. CONNOR AND ALIDA L. CONNOR

vs.

INHABITANTS OF SOUTHPORT.

Lincoln. Opinion, April 9, 1940.

EMINENT DOMAIN. PRIVATE WAYS.

Appellants filing objections to Referees' report are confined to reasons stated in their written objections, and where no objections were made as to award of damages that question is not open to them in the Law Court.

Persons aggrieved by town officers' action in laying out private way over such persons' land should present petition to County Commissioners for relief and appeal from such Commissioners' decision, instead of appealing directly to Superior Court from such action, though such appeal is proper procedure to present question of damages.

Whether persons aggrieved by municipal officers' action in laying out private way over such persons' land have remedy under sections of Revised Statutes providing for appeal to Superior Court depends on the will of the legislature, as expressed in such statute, and original statute may be considered in ascertaining such will, as usually a revision of the statutes simply iterates the former declaration of legislative will.

It is apparent that the purpose and intent of the legislature in including Section 3 *in Chapter* 161 *of the Public Laws of Maine*, 1929, *was only to provide a remedy for persons aggrieved by the action of the municipal officers in improperly discharging, or failing to discharge, the duties required of them by that chapter, and not to provide a remedy for other grievances. The incorporation of that section, as Section* 33, *in the Revised Statutes, directly following the incorporation therein of the other sections of said Chaper* 161, *with nothing to indicate any change of intent, other than to substitute Superior Court for Supreme Judicial Court, does not alter or enlarge the scope and meaning that section had when first enacted.*

On exceptions. Proceedings by W. Prichard and another, inhabitants of the Town of Southport, for laying out of a private way over land of James H. Connor and another. From an order of the officers of such town, laying out such way and awarding damages to respondent landowners, they appealed to the Superior

Court, in which the matter was referred to referees. On appellants' exceptions to acceptance of the referees' report. Exceptions overruled. Case fully appears in the opinion.

Tupper & Harris, for appellants.

Francis W. Sullivan, for appellee.

SITTING: BARNES, C. J., THAXTER, HUDSON, MANSER, WORSTER, JJ.

WORSTER, J. On exceptions to the acceptance of the report of referees.

On petition of W. Prichard and Mary L. Browne, inhabitants of the town of Southport in our County of Lincoln, and pursuant to the provisions of R. S., Chap. 27, Sec. 16, the municipal officers of that town laid out a private way for said petitioners, running from the land occupied by them, over the land of the appellants, to a certain town way, all in said Southport, and awarded $400 damages to the appellants, to be paid to them by the petitioners before the way should be used or improved to make it convenient for travel. This laying out was reported by said officers to said town, and was thereafterwards accepted by said town by vote in a town meeting duly called therefor, and warned and notified as required by law.

The appellants appealed directly to the Superior Court held at Wiscasset, in said county, on the second Tuesday in May, 1939, and in said court they claimed, as their reasons of appeal:

> "... that the statute providing for the taking of private land for private purposes is unconstitutional; that no proper petition was filed with the selectmen; that no proper laying out order was filed by the selectmen, and that the damages awarded by the selectmen were inadequate."

By agreement of parties, the matter was referred to referees, under rule of court, with exceptions reserved as to matters of law.

The referees who heard the case reported an award to the appellants of $750 damages; and to their report, the appellants seasonably filed written objections on the grounds, briefly stated, "That the Statute claimed by the appellees to authorize the laying out of the private way across the appellants' land is unconstitutional . . ." and that the laying out order was insufficient, in that it did not state

whether the way laid out should be subject to gates and bars, as required by statute.

So far as the award of damages is concerned, this appeal, taken directly to the Superior Court, is expressly authorized by R. S., Chap. 27, Sec. 20; but the question of damages is not now before us. The appellants are confined to the reasons stated in their written objections, and since they did not therein object to the amount of damages awarded to them, that question is not open to them here. Moreover, they do not now complain of the damages awarded to them by the referees.

Now while the appellants' appeal directly to the Superior Court was the proper procedure to present the question of damages for determination, yet it was not the proper course to take in order to appeal from the laying out of the way. The legislature expressly and definitely pointed out the procedure to be followed in taking an appeal from the laying out of a way, in R. S., Chap. 27, Sec. 25, which reads as follows:

> "When the municipal officers unreasonably neglect or refuse to lay out or alter a town way, or a private way on petition of an inhabitant, or of an owner of land therein for a way leading from such land under improvement to a town or highway, the petitioner may, within one year thereafter, present a petition stating the facts to the commissioners of the county at a regular session, who shall give notice thereof to all interested and act thereon as is provided respecting highways. When the decision of the municipal officers is in favor of such laying out or alteration, any owner or tenant of the land over or across which such way has been located shall have the same right of petition. When the decision of the commissioners is returned and placed on file such owner or tenant or other party interested has the same right to appeal to the superior court as is provided in sections sixty-one to sixty-four inclusive; and also to have his damages estimated as provided in section eight."

It is to be noticed that under the provisions of this statute, persons aggrieved by the action of the municipal officers in laying out a private way have the same right to petition the county commissioners for relief, as is afforded to those aggrieved by failure of the

municipal officers to lay out a way. The only appeal to the Superior Court which is authorized by this section is from the decision of the county commissioners. No such appeal is presented here, and, so far as disclosed by this record, the appellants have never even presented a petition to the county commissioners, as provided in said statute.

Therefore, there is no appeal before us from the laying out of the way, unless the procedure followed by the appellants is authorized by R. S., Chap. 27, Sec. 33, which reads as follows:

> "Any person or persons aggrieved by the action of the municipal officers may appeal to the superior court in the manner, and subject to the same provisions as set out in section twenty providing for appeals for damages estimated in laying out a town way."

Whether or not the appellants have a remedy under the section last quoted, depends on the will of the legislature, as expressed in that statute; and in a search to ascertain that will, resort may be had to the original statute. *Taylor* v. *Caribou*, 102 Me., 401 at 405, 67 A., 2.

For, as said by Emery, J., in *Cummings et al.* v. *Everett et al.*, 82 Me., 260, 264, 19 A., 456:

> "Usually a revision of the statutes simply iterates the former declaration of legislative will."

This section was originally enacted as Section 3 of Chapter 161, of the Public Laws of Maine, 1929, where it reads as follows:

> "Persons aggrieved may appeal. Any person or persons aggrieved by the action of the municipal officers may appeal to the supreme judicial court in the manner and subject to the same provisions as set out in section twenty of chapter twenty-four of the revised statutes providing for appeals for damages estimated in laying out a town way."

That chapter, however, did not purport to authorize the taking of land from another for any kind of a way, but, as indicated in its title, was "An Act to Regulate the Plotting of Private Lands for Streets or Ways and Imposing Conditions for Recording Maps or Plans of Private Land with Streets or Ways Thereon" and cast

upon the municipal officers certain duties in connection therewith. It is perfectly apparent that the purpose and intent of the legislature in including Section 3 in that chapter was only to provide a remedy for persons aggrieved by the action of the municipal officers in improperly discharging, or failing to discharge, the duties required of them by that chapter, and not to provide a remedy for other grievances. The incorporation of that section, as Section 33, in the Revised Statutes, directly following the incorporation therein of the other sections of said Chapter 161, with nothing to indicate any change of intent, other than to substitute superior court for supreme judicial court, does not alter or enlarge the scope and meaning that section had when first enacted. *Cummings et al.* v. *Everett et al.*, supra.

Therefore, R. S., Chap. 27, Sec 33, affords no remedy to the appellants, and they having failed to take their appeal from the laying out of the private way, in the manner provided by R. S., Chap. 27, Sec. 25, have no appeal properly before us.

Exceptions overruled.

MARION HOOPER SIMMONS, APPELLANT

IN RE ESTATE OF PHOEBE J. HOOPER.

Hancock. Opinion, April 18, 1940.

WILLS. PROBATE COURT.

In the absence of a jury's verdict a decree of the Supreme Court of Probate can not be reviewed on motion.

The presentation of a mere general exception to a judgment rendered by a justice at nisi prius *is not sufficient under the statute and an exception to a judgment rendered in the Supreme Court of Probate is within the rule.*

The findings of a justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. It is only when he finds facts without evidence that his finding is an exceptionable error in law.

On motion and exceptions. This case arises out of an appeal from the decision of the Judge of Probate of Hancock County allowing the will with codicils of Phoebe J. Hooper, late of Bucksport. The Supreme Court of Probate, without an advising jury, heard the appeal, "disallowed and dismissed" it, "approved and reaffirmed" the decree of the Judge of Probate, and so decreed, whereupon the appellant filed a motion for a new trial and exceptions. Motion overruled. Exceptions overruled. Case fully appears in the opinion.

William S. Cole,
Clarke & Silsby, for appellant.
Blaisdell & Blaisdell, for appellee.

SITTING: BARNES, C. J., STURGIS, THAXTER, HUDSON, MANSER, WORSTER, JJ.

HUDSON, J. This case arises out of an appeal from the decision of the Judge of Probate of Hancock County allowing the will with codicils of Phoebe J. Hooper, late of Bucksport. The Supreme Court of Probate, without an advising jury, heard the appeal, "disallowed and dismissed" it, "approved and reaffirmed" the decree of the Judge of Probate, and so decreed, whereupon the appellant filed a motion for a new trial and exceptions.

MOTION. The case is not properly before us on motion. We find no decision of this Court holding that in the absence of a jury's verdict a decree of the Supreme Court of Probate may be reviewed on motion. The contrary has been held. *Gower, Appellant*, 113 Me., 156, 158, 93 A., 64.

In *Tuck* v. *Bean*, 130 Me., 277, 155 A., 274, there being no jury trial, a general motion for a new trial and exceptions were filed. This Court said on page 278:

> "... A decree of a Justice of the Supreme Court of Probate, under the statutes of this state, can not be reviewed by this court on a general motion for a new trial."

In *Eastman et al., Appellants*, 135 Me., 233, 194 A., 586 (trial without jury), there were exceptions and motion for new trial following a decree by the Supreme Court of Probate. The motion was not pressed and procedure by exceptions was commended.

It is to be noted that in *Martin, Appellant*, 133 Me., 422, 179 A., 655, there was a trial by jury.

EXCEPTIONS. The only exception is to the decree of the Supreme Court of Probate by which, as above stated, the decree of the Judge of Probate was affirmed.

In the recent case of *Appeal of Bronson*, 136 Me., 401, 11 A. (2d), 613, it is stated:

> "It is now well settled that this Court under R. S., Chapter 91, Section 24, has jurisdiction over exceptions in civil and criminal proceedings only when they present in clear and specific phrasing the issues of law to be considered. The presentation of a mere general exception to a judgment rendered by a justice at *nisi prius* is not sufficient under the statute. *Gerrish, Exr.* v. *Chambers et al.*, 135 Me., 70. An exception to a judgment rendered in the Supreme Court of Probate is within the rule."

As in the *Bronson* case, *supra*, so here, the only exception "is directed generally and indiscriminately to the judgment below denying the appeal from the Probate Court of original jurisdiction without assignment of the specific error of law upon which the exceptant relies." The *Bronson* case governs and is controlling on the sufficiency of the instant exception.

The employment either of the general motion or of this exception as drafted does not entitle the appellant to a decision on the merits of this litigation, but, nevertheless, a careful study of the record has been made and no injustice appears to have been done.

> "The findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. It is only when he finds facts without evidence that his finding is an exceptionable error in law. *Cotting* v. *Tilton*, 118 Me., 91; *Packard, Applt.*, 120 Me., 556; *Rogers, Applt.*, 123 Me., 459, 461." *Pearson, Appellant*, 127 Me., 542.

Also see *Eacott, Appellant*, 95 Me., 522, 526, 50 A., 708; *Palmer's Appeal*, 110 Me., 441, 443, 86 A., 919; *Thompson, Appellant*, 116 Me., 473, 477, 102 A., 303; *Pembroke, Appellant*, 117 Me., 396, 398, 104 A., 630; *Quinn, Appellant*, 120 Me., 545, 546, 113 A., 38;

McKenzie et al., Appellants, 123 Me., 152, 153, 122 A., 186; *Garland, Appellant*, 126 Me., 84, 98, 136 A., 459; *Mitchell, Exceptant*, 133 Me., 81, 87, 174 A., 38; *Chaplin, Appellant*, 133 Me., 287, 289, 177 A., 192; *First Auburn Trust Co., Appellant*, 135 Me., 277, 282, 195 A., 202; *Wallace* v. *Gilley et al.*, 136 Me., 523, 12 A., 2d, 416.

In conclusion, we do not hesitate to state that there is not only some but ample evidence to support the decision of the Supreme Court of Probate.

Motion overruled.
Exceptions overruled.

PHOEBE W. JEFFS, FLORA MEYERHOFFER SEARS, GRACE S. MCMILLEN, OLIVIA NIELSON AND NOLA RUNDQUIST

vs.

UTAH POWER & LIGHT COMPANY, AND ELECTRIC POWER AND LIGHT CORPORATION.

Kennebec. Opinion, April 26, 1940.

CORPORATIONS.

Promoters who form a corporation and sell to it property which they themselves own are in a fiduciary position to the company and must make a full disclosure to an independent board of directors of all material facts if the sale is to stand.

A bill in equity brought by preferred stockholders for an accounting should show that the new stockholders either came in contemporaneously with the promoters or at such a time or under such circumstances that they are entitled to be treated as if they had.

The law unquestionably is that the corporation can not for the benefit of its shareholders recover promoters' secret profits if all of the capital stock passed through the hands of the promoters to the public.

A suit to recover promoters' secret profits rests on a different basis from the ordinary stockholders' derivative suit. It is founded on the theory that there is a

fraud on the stockholders who subsequently come in to share in the promotional scheme, and that because of such fraud they are permitted to sue either by using the corporate name or in their own names, joining the corporation as a party defendant.

A bill in equity by preferred stockholders, who held no common stock, and who had no right to share in earnings which might accrue over and above the amount necessary to satisfy the dividends on the preferred stock, which alleged that promoters obtained commissions for sale of corporation's preferred stock which was not earned, was insufficient to compel accounting of alleged secret profits of promoters, in absence of showing that preferred stock dividend was thereby impaired.

On appeal. Bill in equity brought by five preferred stockholders of the Utah Power & Light Company, a Maine corporation, for an accounting by the Electric Power & Light Corporation, another Maine corporation, of certain alleged secret promoters' profits claimed to be held by the Electric Power & Light Corporation which it had received in part from its predecessor in title, the Utah Securities Corporation, a Virginia corporation, one of the original promoters in the organization of the Utah Power & Light Company, and in part in direct payments. The plaintiffs bring the bill on behalf of themselves and of any stockholders who may wish to join and on behalf of the defendant, the Utah Power & Light Company. Defendants demurred both generally and specially. Demurrers sustained and a decree was entered dismissing the bill as to both defendants with costs. Plaintiffs appealed. Appeal dismissed. Decree dismissing the bill with costs affirmed. Case fully appears in the opinion.

Locke, Campbell & Reid,
Pattangall, Goodspeed & Williamson,
Critchlow & Critchlow,
Joel Nibley,
Putney, Twombley & Hall, for plaintiffs.
George R. Corey,
McLean, Fogg & Southard,
Simpson, Thacher & Bartlett,
Perkins & Weeks, for defendants.

SITTING: BARNES, C. J., STURGIS, THAXTER, MANSER, JJ.

THAXTER, J. This is a bill in equity brought by five preferred stockholders of the Utah Power & Light Company, a Maine corporation, for an accounting by the Electric Power & Light Corporation, another Maine corporation, of certain alleged secret promoters' profits claimed to be held by the Electric Power & Light Corporation which it had received in part from its predecessor in title, the Utah Securities Corporation, a Virginia corporation, one of the original promoters in the organization of the Utah Power & Light Company, and in part in direct payments. Other relief such as cancellation of the common stock of Utah Power & Light Company, claimed to have been issued without consideration, or the payment for it is asked for. The plaintiffs bring the bill on behalf of themselves and of any stockholders who may wish to join and on behalf of the defendant, the Utah Power & Light Company.

The defendants demurred both generally and specially. These demurrers were sustained and a decree was entered dismissing the bill as to both defendants with costs. From such decree the plaintiffs have appealed.

The transactions set forth in the bill are exceedingly complex. They concern the dealings of five corporations with each other, only two of which are parties to the bill. Large amounts of money and property were passed from one to another for no apparent reason as disclosed by the bill. The plaintiffs claim that it all has been in pursuance of a scheme formulated almost thirty years ago whereby the Electric Bond & Share Company of New York and its associates would acquire electric utility properties in Utah, Idaho, and Colorado and by means of pretended sales would cause title to these properties to become vested in an operating company, Utah Power & Light Company, one of the defendants in this case, at greatly inflated prices without disclosing to such company or to its prospective stockholders the cost of such properties or the fact of such inflation, and thereby fraudulently and unlawfully would obtain for the syndicate and its associates large secret profits, and also would retain the control and management of such operating company for the syndicate and those associated with it to the detriment of the operating company and its stockholders. Such in brief is the plaintiffs' claim.

We are concerned, however, with what actually happened and

with the effect of the various manipulations on the rights of these plaintiffs. It is accordingly necessary to analyze the allegations of the bill with some care.

The Electric Bond & Share Company, a New York corporation, is said to be in the business of promoting, financing, managing and controlling utility corporations. September 6, 1912, it caused the defendant, Utah Power & Light Company, to be organized as a corporation under the laws of Maine. The corporation started with nominal stock which two months later was increased to $40,000,000.00 consisting of 400,000 shares of the par value of $100.00 each. The certificate of incorporation was later amended to authorize the issuance of other classes of stock which from time to time was sold to the investing public as directed by the Electric Bond & Share Company. At the same time the Electric Bond & Share Company caused the Utah Power Company to be organized as a corporation under the laws of Maine with an authorized issue of 60,000 shares of stock of the par value of $100.00 of which 50,000 shares were common stock and 10,000 shares were preferred. The directors and officers of this corporation it controlled. At about the same time it caused to be organized under the laws of Virginia a third corporation, Utah Securities Corporation, which was the predecessor of the defendant, The Electric Power & Light Corporation, which to all intents and purposes stands in its shoes. The authorized capital of this corporation was $30,000,000.00, represented by 300,000 shares. Controlling all of these corporations Electric Bond & Share Company proceeded to pass property through the Utah Power Company and the Utah Securities Corporation until title finally reposed in its other ward the Utah Power & Light Company which was the operating unit.

The first transaction took place September 25, 1912, when it is alleged Utah Power Company purchased from an agent of Electric Bond & Share Company by which it was then controlled certain utility properties and securities which had been acquired by Electric Bond & Share Company at a cost to it of not exceeding $2,975,091.35, and paid therefor $8,500,000.00, in notes of the Utah Power Company in the amount of $2,500,000.00, in preferred stock of the par value of $1,000,000.00, and in common stock of the par value of $5,000,000.00. September 26, 1912, Utah Securities

Corporation at the direction of Electric Bond & Share Company traded 274,990 shares of its capital stock having a par value of $27,499,000.00 for the 50,000 shares of stock of the Utah Power Company and also took the $2,500,000.00 notes and the $1,000,000.00 preferred stock, and certain other securities which had been acquired by Electric Bond & Share Company at a cost to it of not exceeding $1,800,947.47 and paid therefor $4,500,000.00 in cash. November 1, 1912, Utah Securities Corporation at the direction of Electric Bond & Share Company purchased securities from Electric Bond & Share Company which had cost the latter $1,962,365.36, and paid therefor $1,962,365.36 in cash and in 25,000 shares of capital stock of Utah Securities Corporation of a par value of $2,500,000.00.

At this stage in the promotional scheme it appears from the above that Utah Securities Corporation was the owner of property and securities which had cost Electric Bond & Share Company $6,738,397.18 and that for these it had paid in cash $6,462,365.36 and in 299,990 shares of its own capital stock of a par value of $29,999,000.00.

At this point on December 12, 1912, as alleged in the bill Utah Power & Light Company enters the scene and was caused by the promoting companies to purchase these properties and securities held by Utah Securities Corporation which had cost it $6,738,397.18, together with certain other securities which had cost $4,158,111.00 and to pay therefor as follows:

$9,500,000.00 in 6% three year notes,
$3,500,000.00 in par value second preferred stock,
$20,000,000.00 in par value common stock.

January 25, 1913, at the instigation of the promoters Utah Power & Light Company bought from Utah Securities Corporation properties and securities which had cost the latter $2,152,832.33, and paid therefor in 78,370 shares of its common stock of a par value of $7,837,000.00. During the month of February, 1913, at the direction of the promoting companies Utah Securities Corporation surrendered to Utah Power & Light Company $4,500,000.00 of the latter's 6% notes which it held and 28,370 shares of common stock, and in exchange therefor received 30,000 shares of 7% preferred

stock of Utah Power & Light Company of the par value of $3,000,000.00 and 43,370 shares of its 6% second preferred stock of the par value of $4,337,000.00.

Following through these transactions we now find that the Utah Power & Light Company had properties which had cost the promoters $13,049,340.51 and it had outstanding against these the following securities:

$5,000,000.00 6% three year notes,
$3,000,000.00 7% preferred stock,
$7,837,000.00 6% second preferred stock,
$25,000,000.00 common stock.

Two years later in February, 1915, in pursuance of the scheme of promotion the following transaction took place as set forth in the bill. Utah Securities Corporation transferred properties which had cost it $1,097,400.00 to Utah Power & Light Company and cancelled an indebtedness of Utah Power & Light Company of $416,001.68. Utah Power & Light Company in turn issued its notes to Utah Securities Corporation in the amount of $242,314.19, cancelled an indebtedness of Utah Securities Corporation of $900,000.00 and issued to the latter 50,000 shares of common stock.

Carrying through all of these transactions we now find the following situation as set forth in the plaintiffs' bill and admitted by the defendants' demurrer:

Property and securities received by Utah Power & Light Company at their cost to the promoters		$14,146,740.51
Payments for the above had been made as follows:		
6% three year notes	$5,000,000.00	
Other notes	242,314.19	
Net amount of indebtedness after inter-company cancellations	483,998.32	
TOTAL		$5,726,312.51

7% preferred stock par value	3,000,000.00
2nd preferred stock par value	7,837,000.00
Common stock par value	30,000,000.00

Two years after this while the balance sheet so far as the bill shows remained as above the Utah Power & Light Company began to sell its preferred stock to the public.

The bill alleges that at this time the promoters had garnered large amounts of secret profits. But we must not lose sight of the fact that the promoters were on both sides of the transactions, and were the only ones interested. It was as if A, B and C, owning property worth let us say $100,000.00 had formed a corporation and transferred that property to it in return for 5,000 shares of capital stock of an aggregate par value of $500,000.00. They were both sellers and buyers and acted with a full knowledge of all the facts. How could anyone claim that at this point any fraud was committed? And where is there any profit? In the place of property worth $100,000.00 the promoters had shares of stock worth $100,000.00. One can not defraud himself, nor does one make a profit merely by changing his ownership from a tangible to an intangible form. The most which can be said is that in the case before us the bill by inference at least implies that there is something sinister in the circuity of these transactions, in their deviousness, and in their complexity. But nothing yet has happened. It is as if the stage were being set for a drama which has not yet commenced. The intended victim of all these machinations has not yet appeared. This is the story as set forth by the bill when in 1917 preferred stock was offered to the public by the operating company. In considering the rights of these new stockholders we must not lose sight of the fact that the company was the owner of property which had cost the promoters over $14,000,000.00 and had outstanding securities senior to the preferred stock to be offered to the public or on an equality with it of $8,726,312.51.

Before considering the other allegations wherein it is claimed the promoters received secret and unlawful profits let us consider the situation to this point; for the gravamen of the plaintiffs' complaint seems to be based on the transactions enumerated above.

The plaintiffs base their right to recover on the case of *Mason* v.

Carrothers, 105 Me., 392, 74 A., 1030. This case was decided more than thirty years ago at a time when the courts both in this country and in England were seeking to find some solution for a problem, then presented by isolated cases, which had not at that time so touched the public conscience that preventive measures had been adopted through legislation. Because judicial remedies could only be invoked after the harm had been done and because there were so many procedural difficulties in the way, the net result of what the courts have accomplished has been disappointing. Nowhere is there better proof of the adage that an ounce of prevention is worth a pound of cure.

When we consider the history of this subject we shall see how distinct are the facts set forth in this bill from those presented in the classic cases on which the plaintiffs rely. Reduced to its simplest terms the problem presented by these cases is this. Promoters A, B and C, owning property let us say worth $100,000.00 transfer it to a corporation and receive in exchange stock of a par value of $500,000.00. Stock is then sold by the company to the public for cash at $100.00 per share, in an amount of $500,000.00. It is obvious that a gross fraud has been perpetrated on the outside stockholders, for they have put $500,000.00 into the company, the promoters have put in $100,000.00, and yet the promoters share equally with the outsiders in the assets.

In England more than sixty years ago the House of Lords laid down the general principle that promoters who form a corporation and sell to it property which they themselves own are in a fiduciary position to the company and must make a full disclosure to an independent board of directors of all material facts if the sale is to stand. *New Sombrero Phosphate Company* v. *Erlanger*, 5 Ch. D. 73, Aff'd 3 App. Cas. 1218 (1878); *In re Olympia, Ltd.* (1898), 2 Ch. 153, Aff'd (1900), App. Cas. 240; Sub. Nom. *Gluckstein* v. *Barnes*. In this latter case the company was permitted to recover a secret profit made by the promoters at its expense. In disposing of the contention that a disclosure had been made Lord MacNaughten in his opinion in the House of Lords said: " 'Disclosure' is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company,

when as yet there were no stockholders, is a mere farce. To the intended shareholders there was no disclosure at all. On them was practiced an elaborate system of deception."

Following the principle enunciated in these cases the Massachusetts court laid down the doctrine that promoters of a corporation who issue to themselves a part of the capital stock in payment for services at an excessive valuation, are guilty of a fraud when the facts are not disclosed to those who are invited to subscribe for stock. Such promoters it was held are liable to account in equity in a suit brought by the corporation. *Hayward* v. *Leeson*, 176 Mass., 310, 57 N. E., 656. Though recovery was permitted through the medium of the corporation, the Court recognized, page 320, 57 N. E., 661, that the fiduciary relationship was in fact with "the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders."

A few years later came the *Old Dominion Copper Company* cases. The question arose first on a demurrer to the bill which was overruled on the authority of *Hayward* v. *Leeson*, supra. *Old Dominion Copper Mining & Smelting Company* v. *Bigelow*, 188 Mass., 315, 74 N. E., 653. The bill was then heard on the merits and sustained. This ruling was affirmed. *Old Dominion Copper Mining & Smelting Company* v. *Bigelow*, 203 Mass., 159, 89 N. E., 193. Two promoters, Bigelow and Lewisohn, owners of certain mining properties, organized a corporation under the laws of New Jersey. While owning all of the original shares subscribed for and in complete control of the corporation, they caused it to issue to them shares of a par value of $3,250,000.00 in payment for property which had cost them $1,000,000.00, the market value of which was then a little less than $2,000,000.00. It was the intention to sell at par to the public shares of a par value of $500,000.00 to provide working capital. Within a very short time thereafter substantially all of this remaining stock was sold to the public without disclosure of the contract between the company and the promoters, under which they obtained their stock. The defendant Bigelow was held liable to account to the corporation for the secret profit received by the promoters.

At about the same time a similar suit was started in the United States Circuit Court for the Southern District of New York. A demurrer to the bill was sustained and this ruling was affirmed by the

Circuit Court of Appeals. On certiorari this ruling was unanimously affirmed by the Supreme Court. *Old Dominion Copper Mining & Smelting Company* v. *Lewisohn*, 210 U. S., 206, 28 S. Ct., 634. We thus have a situation where the Supreme Judicial Court of Massachusetts and the United States Supreme Court reached a diametrically opposite result on exactly the same state of facts. The Supreme Court opinion written by Justice Holmes holds that the corporation, which was the plaintiff, had, before any stock had been sold to the public, assented to the transaction complained of; that at that time no wrong had been done to anyone; that if the corporation had no right to recover at that time, it got no new right by reason of the fact that the public subsequently became stockholders. The opinion points out an injustice which may follow from the application of the Massachusetts doctrine. The corporation may recover the profit received by all from any one of the promoters. This promoter may own a relatively small number of shares. As no contribution can be enforced from the others he pays the whole amount; and the others, if still remaining stockholders, get the benefit. That this result was possible was recognized both by the English courts and by the Massachusetts court but was not held a bar to recovery. *New Sombrero Phosphate Company* v. *Erlanger*, supra, L. R. 5, Ch. D. 73, 114. Jessel, M. R. said: "But the doctrine of this Court has never been to hold its hand and avoid doing justice in favour of the innocent, because it cannot apportion the punishment fully amongst the guilty." See also *Old Dominion Copper Mining & Smelting Company* v. *Bigelow*, supra, 203 Mass., 159, 192, 89 N. E., 193.

The Supreme Court case has been followed by some courts. *Hughes* v. *Cadena de Cobre Mining Co.*, 13 Ariz., 52, 108 P., 231; *Lilylands Canal Co.* v. *Wood*, 56 Colo., 130, 136 P., 1026; *Lake Mabel Development Corp.* v. *Bird*, 99 Fla., 253, 126 So., 356; *Hoffman Motor Truck Co.* v. *Erickson*, 124 Minn., 279, 144 N. W., 952; *Continental Securities Co.* v. *Belmont*, 154 N. Y. S., 54, Aff'd 222 N. Y., 673, 119 N. E., 1036; *Blum* v. *Whitney*, 185 N. Y., 232, 77 N. E., 1159; *Metcalfe* v. *Mental Science Ind. Ass'n*, 127 Wash., 50, 220 P., 1. See also *Henderson* v. *Plymouth Oil Co.*, 16 Del. Chan. 347, 141 A., 197.

The doctrine of the *Lewisohn* case has, however, been very much

qualified. See *McCandless* v. *Furland*, 296 U. S., 140, 56 S. Ct., 41. The dissenting opinion in this case holds that the decision is in conflict with the *Lewisohn* case. But see *Arn* v. *Dunnett*, 93 F. (2d), 634, Cert. Den'd, 304 U. S., 577, 58 S. Ct., 1046.

Outside of the Federal courts the weight of authority supports the Massachusetts rule. *Beal* v. *Smith*, 46 Cal. App., 271, 189 P., 341; *Parker* v. *Boyle*, 178 Ind., 560, 99 N. E., 986; *Datillo* v. *Roaten Creek Oil Co.*, 222 Ky., 378, 300 S. W., 854; *American Forging and Socket Co.* v. *Wiley*, 206 Mich., 664, 173 N. W., 515; *Allenhurst Park Estates, Inc.* v. *Smith*, 101 N. J. Eq., 581, 138 A., 709; *Nebraska Mausoleum Co.* v. *Matters*, 108 Neb., 618, 188 N. W., 231; *Torrey* v. *Toledo Portland Cement Co.*, 158 Mich., 348, 122 N. W., 614; *Rugger* v. *Mt. Hood Electric Co.*, 143 Ore., 193, 20 P., 2d, 412; 21 P., 2d, 1100; *Pietsch* v. *Milbrath*, 123 Wis., 647, 101 N. W., 388, 102 N. W., 342; *Bennett* v. *Havelock Electric Light & Power Co.*, 20 Ont. L. Rep., 120; *Gluckstein* v. *Barnes*, supra; *Wills* v. *Nehalem Coal Co.*, 52 Ore., 70, 96 P., 528; See also *Roberson* v. *Draney*, 53 Utah, 263, 178 P., 35; *Downey* v. *Byrd*, 171 Ga., 532, 156 S. E., 259, 72 A. L. R., 345.

Comments on this general subject will be found in 22 Harv. L. Rev. 48, 45 Yale L. J., 511; also in an article by Arthur W. Machen, 24 Harv. L. Rev. 347, 356 *et seq.* A full discussion will be found in an article by A. A. Berle, Jr. in 42 Harv. L. Rev. 748. In 30 Harv. L. Rev. 39, R. D. Weston, who was the master appointed in the matter of two petitions for review in the *Bigelow* case, discusses some of the practical problems which arise under the doctrine of that case.

These problems are very real and have caused courts to qualify the rule in important respects — qualifications which in some instances relate to substance and in others to the remedy. Some of these have a direct bearing on the present case.

In the first place it is made clear in the *Bigelow* case that, though the promoters stand in the relation of trustees to the corporation and the technical wrong is to the corporation which brings the suit, the real injury is done to those stockholders who are asked to put cash into the enterprise as a part of the promotional plan for the purpose of starting the corporation on its course. Those who come in later may, however, stand on an entirely different basis. We must

recognize that property put into a new venture may, by its combination with other units or by the efficient use which is made of it, attain a value which by itself it did not have. Furthermore the profits which a business earns may be used for expansion or left to accumulate over the years; and what started as an uncertain, feeble venture may ripen into a stable, prosperous, going concern in which the public is glad to invest irrespective of the manner of its organization. The wrong to the future shareholders is in the invitation to them by the promoters to come in under the expectation that assets and profits will be shared proportionately by those who assume the same proportionate share of the risk. A bill in equity such as that now before us should therefore show that the new stockholders either came in contemporaneously with the promoters or at such a time or under such circumstances that they are entitled to be treated as if they had. The Massachusetts court has made it very clear that future stockholders coming in at a remote time may be in an entirely different position from those who came in during the promotional stage. For that court said, *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, supra, 203 Mass., at page 191, 89 N. E., at page 207, in discussing the case of *Salomon* v. *Salomon* (1897), App. Cas., 22, where a part of the authorized capital at the time of organization was not issued: "It was to be issued or not in the remote future, as the exigencies of the corporation in the actual conduct of its business might require, but, in any event, it was not to be issued for the purpose of starting the corporation on its course. This circumstance materially affects the question here to be considered."

There is a further limitation on the right of the corporation to recover secret profits. If the promoters are the original subscribers to the entire capital stock contemplated to be issued and these promoters sell their shares to innocent outside parties without disclosing the secret profits, there is no fraud on the corporation and there can be no recovery under the doctrine of the *Bigelow* case. *Hays* v. *The Georgian, Inc.*, 280 Mass., 10, 181 N. E., 765, 85 A. L. R., 1251. To the one who has been defrauded it would seem to make little difference whether he has received his stock directly from the corporation or from the hands of the promoters. But having in the *Bigelow* case, 188 Mass., 315, 325, 74 N. E., 653, based

the right to recover on the theory that there had been no acquiescence in the promoters' scheme by the future stockholders who bought from the corporation, the Court could see no escape from the conclusion of the *Georgian* case where the assent of all the stockholders appeared to have been given. A dictum in *Mason* v. *Carrothers*, 105 Me., 392, 399 (see also discussion on page 406), 74 A., 1030, supports the principle of the *Georgian* case, which has been generally followed in this country. The law unquestionably is that the corporation can not for the benefit of its shareholders recover promoters' secret profits if all of the capital stock passed through the hands of the promoters to the public. *The Mile Wide Copper Co.* v. *Piper*, 29 Ariz., 129, 239 P., 799; *Turner* v. *Markham*, 155 Cal., 562, 102 P., 272; *Lake Mabel Development Corp.* v. *Bird*, supra; *Tompkins* v. *Sperry, Jones & Co.*, 96 Md., 560, 54 A., 254; *Brooker* v. *Wm. H. Thompson Trust Co.*, 254 Mo., 125, 162 S. W., 187; *Piggly Wiggly Delaware* v. *Bartlett*, 97 N. J. Eq., 469, 129 A., 413; *Blum* v. *Whitney*, supra; *Hamilton* v. *Hamilton Mammoth Mines, Inc.*, 110 Ore., 546, 223 P., 926; 18 C. J. S., 553-554.

Bearing in mind these general principles let us consider the law in this jurisdiction and its applicability to the facts of the case now before us.

Our Court has adopted the English doctrine that promoters stand in a fiduciary relation to the corporation which they bring into being. *Camden Land Co.* v. *Lewis*, 101 Me., 78, 63 A., 523; *Mason* v. *Carrothers*, supra. In *Mason* v. *Carrothers* the Court undoubtedly adopted the doctrine of *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, supra, 203 Mass., 159, 89 N. E., 193, although the suit was brought directly by the shareholders claiming to have been injured instead of by the corporation as in the Massachusetts case. As counsel in the instant case claim that the facts set forth in the plaintiffs' bill are substantially the same as in the case of *Mason* v. *Carrothers*, an analysis of that case is necessary.

The bill in *Mason* v. *Carrothers* was brought by eleven preferred stockholders of the Marine Safety Appliance Company, against the company and other stockholders who were its promoters to secure the cancellation of certain shares of stock claimed to have been illegally issued. Two of the defendants, Barcus and Hallam, agreed to form a corporation with a capital of $1,000,000.00 divided into

$200,000.00 of six per cent cumulative preferred stock and $800,000.00 common stock. Irvine and Lihou, the owners of certain patent rights agreed to transfer these to the corporation in return for $100,000.00 of preferred stock and $50,000.00 of common stock and certain cash payments and an agreement for royalties. The corporation was formed November 13, 1905. Instead of the patent rights being transferred directly to the corporation, they were assigned to Barcus and Hallam on November 17, who in turn assigned them to the corporation and took in payment $100,000.00 of the preferred stock and $799,400.00 of the common stock, being all of the common stock authorized except the shares standing in the names of the temporary incorporators. Barcus and Hallam then assigned $100,000.00 of the preferred stock and $50,000.00 of the common stock to Irvine and Lihou, and either directly or through the corporation secured to them the balance of the payment for the patent rights. They also transferred back to the corporation $200,000.00 par value of the common stock. These dealings resulted in the following situation. Irvine and Lihou had been paid in accordance with their agreement. In addition to their royalty agreements and $10,000.00 in cash and notes they had $100,000.00 preferred stock and $50,000.00 in common stock of the corporation; Barcus and Hallam had $549,400.00 of the common stock which appears to have cost them nothing except the time and labor which they had put into organization work; and there was $100,000.00 of preferred stock unissued and $200,000.00 of common in the corporate treasury. Barcus and Hallam appear to have later assigned their stock to the defendant, Carrothers, who took it with full knowledge of these transactions. Within three months after the organization of the corporation the plaintiffs purchased stock from the corporation, receiving for each $100.00 paid in one share of preferred stock and two shares of common.

The real problem in this scheme of promotion is to determine the status of the common stock and particularly that part which went to the preferred stockholders who brought the bill in equity joining the promoters and the corporation as defendants. For the court held that the stock issued to Barcus and Hallam was wrongfully issued in breach of a fiduciary duty and that a master should be appointed to determine the rights of all parties.

It may be argued that this case is an authority for the proposition that any preferred stockholder may maintain a bill in equity to secure the cancellation of common stock wrongfully issued. This contention may be founded on the theory that the plaintiffs in so far as they were holders of common stock which had passed through the hands of Barcus and Hallam were bound under the authority of *Hays* v. *The Georgian, Inc.*, supra, by the assent of Barcus and Hallam to the issuance of the stock and hence that their only right to bring the action arose out of their holdings of preferred stock. It is evident, however, that the real transaction was the issuance of $549,400.00 in common stock to Barcus and Hallam and the retention by the corporation of $200,000.00 as unissued. Just why it was all issued to them and $200,000.00 turned back is not apparent nor is it important; for we are concerned with the substance of the transaction, not with its form. Such has been the view of a number of courts in treating analogous situations. *California-Calaveras Mining Co.* v. *Walls*, 170 Cal., 285, 300-301, 149 P., 595; *Datillo* v. *Roaten Creek Oil Co.*, supra; *American Forging & Socket Co.* v. *Wiley*, supra; *Torrey* v. *Toledo Portland Cement Co.*, supra; *Anderson* v. *Johnson*, 45 R. I., 17, 119 A., 642.

The theory of *Mason* v. *Carrothers*, supra, is that the plaintiffs, having paid value for common stock, were injured by reason of the fact that other similar stock had been issued to others without consideration. To be sure the common stock was called bonus stock, but the essence of the transaction was that the plaintiffs paid on the basis of $100.00 for one share of preferred stock and two shares of common. In principle the case is identical with *Old Dominion Mining & Smelting Co.* v. *Bigelow*, supra, 203 Mass., 159, 89 N. E., 193, although the remedy differs in form. The case is not an authority for the proposition that a preferred stockholder as such has an unqualified right to maintain an action for the cancellation of common stock issued without consideration. It must be evident that promoters make no secret profit merely by the issuance without consideration of common stock to themselves. Their profit comes when that stock is either resold to outsiders, or outsiders, paying a consideration for unissued stock, participate with the promoters in the enterprise.

Coming now to the proposition before us, it is evident that in a number of respects the plaintiffs do not bring their case within the principles laid down by the cases which follow the Massachusetts rule. There is no definite allegation in the bill as to the actual value of the property turned over by the promoters. We are told merely the price which the promoters paid for it. For the purpose of this opinion, however, we shall assume that this represented its value.

Furthermore it is not clear from the bill that the stock which the plaintiffs own may not, while in the hands of prior owners, have assented to the acts of which the plaintiffs now complain. Under these circumstances, if we follow the doctrine of *Hays* v. *The Georgian, Inc.*, supra, the plaintiffs would be estopped to assert their present claims. But let us leave that suggestion aside, for there are other more important considerations.

The acts complained of which we are now considering started in 1912 and the last transaction involving the alleged wrongful issuance of stock was in February, 1915. Phoebe Jeffs, one of the plaintiffs, purchased from Utah Power & Light Company in September and October, 1922, more than six years and a half after the last of the issues of stock complained of, three shares of preferred stock at $96.00 per share plus accrued dividends. The plaintiff, Flora Sears, purchased three shares for the same price and under similar circumstances in July and August of that year. The plaintiff, Olivia Nielson, purchased two hundred and eighty shares of preferred stock at various times during and subsequent to the year 1927; but it does not appear that any of this stock was bought from the company. The other two plaintiffs own ten and five shares respectively; but the bill does not allege when or under what circumstances they bought them. The bill does state that none of the plaintiffs had any knowledge until just before the bringing of the suit of any of the unlawful or fraudulent acts complained of.

It can be readily seen that this presents an entirely different picture from what we see in the Massachusetts cases, in *Mason* v. *Carrothers*, supra, and in fact in all the other instances where the bills have been sustained. In each of them the transfer of shares to the promoters and the sale to the plaintiffs have been a part of one transaction. They have been contemporaneous. In more than six years much water can be squeezed out of stock, and, in the absence

of allegations to the contrary, we may assume that the corporate balance sheet during such a period may have materially changed. It is evident that the plaintiffs did not purchase their stock during the promotional stage. To adopt the language of the Massachusetts court in *Old Dominion Mining & Smelting Co.* v. *Bigelow*, supra, 203 Mass., 159, 89 N. E., 193, their stock was not issued "for the purpose of starting the corporation on its course."

But there is another more fundamental reason why the plaintiffs can not prevail. They are preferred stockholders and do not hold both preferred and common stock as was the case in *Mason* v. *Carrothers*, supra. Under the facts set forth in the bill it is impossible to see how they have been damaged by the acts complained of. At the time when preferred stock was offered to the public there was outstanding $5,726,312.51 indebtedness of the corporation and it had issued preferred stock of a par value of $3,000,000.00. Against this it had property which the bill concedes cost the promoters $14,146,740.51. There was therefore an equity represented by junior securities of $5,420,428.11. What did it matter to the plaintiffs whether that equity was represented by one share, or by three hundred and ten thousand, or by more than that? There might possibly have been an effect on voting control but the bill does not allege concealment from the plaintiffs of the amount of stock outstanding, but only of the want of consideration received for it. As a matter of fact if junior stock was issued, if for any consideration at all, the plaintiffs were benefited rather than harmed; for the protection back of their own investment was increased by the value of such property irrespective of the amount of securities issued against it.

There is nothing in this bill to show that the shares of stock issued to these promoters in any way impaired the security of the plaintiffs' stock or any preference to which it was entitled. The preferred stockholders so far as the bill indicates had no interest in the share of the corporate assets of those holding securities junior to theirs, nor in the earnings which might accrue over and above the amount necessary to satisfy the dividends on the preferred stock. The preferred stockholder was given no bonus of common stock as in the case of *Mason* v. *Carrothers*, supra. A plaintiff, who can show no injury to himself by reason of the facts of which he complains, surely has no standing in court. For a discussion of the rights of

preferred stockholders in this situation see an article by A. A. Berle, Jr., 42 Harv. L. Rev. 748, 759-762.

Two cases throw further light on this subject.

Rugger v. *Mt. Hood Electric Co.*, supra, was a suit by preferred stockholders to enjoin the payments of alleged claims of officers and directors of a corporation which were held to constitute unlawful, secret profits. In holding that the action could be maintained under the principle of *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, supra, 203 Mass., 159, 89 N. E., 193, the opinion was careful to point out that the rights of the preferred stockholders were based on a provision of the articles of incorporation providing that twenty-five per cent of the annual net profits after the payment of a seven per cent dividend on the preferred stock and a like amount on the common should be set aside as a reserve fund to be used to retire the preferred stock. The preferred stockholders, therefore, had a direct interest in the amount of the common stock issued.

In *Roberson* v. *Draney*, supra, the court in a dictum, 53 Utah, page 272, 178 P., 35, follows the Massachusetts doctrine but holds that a plaintiff to be entitled to relief under it must show either an injury to his property rights by reason of the acts complained of, or that the corporation has suffered a tangible wrong. He must be acting not as an interloper but in good faith.

Another case cited by the plaintiffs is very significant. *Barrett* v. *Webster Lumber Co.*, 275 Mass., 302, 175 N. E., 765. This was a bill by a preferred stockholder seeking to restrain one of the defendants from enforcing payment of certain notes of the corporation which he had received in payment for common stock of the corporation which the corporation had bought from him. One of the grounds for dismissing the bill was that at the time of such purchase there were ample assets to pay the corporate debts and the entire outstanding preferred stock, and that therefore a preferred stockholder had no cause to complain. The only ones who could possibly have been injured were the common stockholders and they had assented to the transaction.

The plaintiffs do suggest in their brief that they have suffered an injury in that the cushion of protection behind their investment was not what it was represented to be. They do not claim any direct misrepresentation. But they suggest that they had a right to assume

that the 300,000 shares of common stock and the 78,370 of second preferred represented $37,837,000.00 of assets. Assuming it all to be true they nowhere allege that their stock is worth any less than they paid for it. But beyond this counsel cite no case holding that a preferred stockholder has any absolute right to compel common stockholders to pay in full for the common stock issued to them, nor is any such case not based on a statute likely to be found. The two cases cited do not sustain such a proposition. In *Scully* v. *Automobile Finance Co.*, 11 Del., Ch. 355, 101 A., 908, the common stock was issued in violation of the statutes and constitution of Delaware, and from the opinion it also appears that the complainants received with their purchase of preferred stock a bonus of common. In *Howard* v. *National Telephone Co.*, 182 Fed., 215, the stock was issued in violation of a statute.

A suit to recover promoters' secret profits rests on a different basis from the ordinary stockholders' derivative suit. It is founded on the theory that there is a fraud on the stockholders who subsequently come in to share in the promotional scheme, and that because of such fraud they are permitted to sue either by using the corporate name as in *Old Dominion Mining & Smelting Co.* v. *Bigelow*, or in their own names, joining the corporation as a party defendant as in *Mason* v. *Carrothers*. That this right is formulated on the theory that a wrong has been done to the corporation by the promoters who stand in a fiduciary relationship to it, must not obscure from us the fact that the real basis of the action is the wrong done to the future innocent shareholders, who will find it difficult to obtain effective redress if left to their individual actions against the promoters. To assume, as the plaintiffs apparently have in this case, that under the doctrine of *Mason* v. *Carrothers*, there is the right on the part of a stockholder in a corporation to sue promoters for supposed secret profits, irrespective of the injury done to such stockholder, is to confound the remedy which the courts have adopted in these cases with the wrong itself.

The plaintiffs have shown no actionable wrong done to themselves by reason of the issuance of the securities to the promoters, nor in fact any such wrong done to the corporation which is the foundation for a derivative suit. Two other charges in the bill need to be considered.

The bill alleges that in the years from 1917 to 1925 the promoters caused the defendant, Utah Power & Light Company, to sell its preferred stock to the public and that the promoters received commissions for obtaining purchasers of from seven to ten per cent on the price of the stock sold, totaling in all $831,200.00. These commissions the bill holds were not earned, and were not disclosed to the public or to the Utah Power & Light Company, and constituted unlawful, secret profits.

The payment of excessive commissions to brokers and to others in the underwriting and sale of corporate securities has been a wrong which recent legislation has sought to correct. But taking the allegations of this bill most favorably to the plaintiffs, it is hard to see how they can be the basis for the relief asked for here. It is true as the defendants urge that the allegations are set forth in general terms and probably do not give us the whole story. Furthermore they seem to suggest rather an aggravation of the more fundamental charges against the promoters. So far as the bill shows these payments may have been charged against accumulated earnings which belonged to the common stockholder, the Electric Power & Light Corporation, the real defendant here. See *Bates Street Shirt Company* v. *Waite*, 130 Me., 352, 362, 156 A., 293, which holds that the payment of excessive salaries out of earnings, if the preferred stock dividend is not impaired, is not a just cause for complaint on the part of a preferred stockholder. In any event the implication of the bill is that the payments were made from assets which belonged to that stockholder and that no injury resulted to the preferred stockholders.

Likewise the complaint that dividends were paid to Electric Power & Light Corporation on the common stock during the years 1925 to 1932 inclusive is without merit. It seems to be based on the theory as alleged in the bill that because the stock itself represented an unlawful and secret profit no dividend could be paid on it. What has been said heretofore in this opinion disposes of this contention. In passing, however, we might remark that the bill does not allege that such dividends were not paid out of earnings or that the payment in any way impaired the safety of the preferred stock covenants.

In view of what has been already said, it seems unnecessary to con-

sider further the allegations of the bill, or to comment on the other arguments of defendants' counsel.

Appeal dismissed.
Decree dismissing the bill with costs affirmed.

CHARLES F. BRAGDON *vs.* EDWARD SMITH,

EXECUTOR OF THE LAST WILL OF HOYT L. SMITH.

Hancock. Opinion, April 29, 1940.

WILLS. EXECUTORS AND ADMINISTRATORS.

In an accurate and legal sense, all the personal property of the deceased, which is of a salable nature, and may be converted into ready money, is deemed "assets," but the word is not confined to such property; for all other property of the deceased which is chargeable with his debts or legacies, and is applicable to the purpose, is, in a large sense, assets.

Legal assets are such as come into the hands and power of an executor or administrator or such as he is intrusted with by law virtute officii to dispose of in the course of his administratorship.

A devise of land after payment of debts, is a charge on the land.

It is the general rule that where the testator's intention clearly appears that a legacy should be paid at all events, the real estate is made liable, on a deficiency of assets.

The residuary clause in a will bequeathing to testator's cousin all the residue and remainder of his property, real, personal and mixed, to have and to hold to him and his heirs and assigns forever, was not a "specific bequest" and was not, therefore, exempt from payment of all debts and legacies, which is the usual burden of residuary bequests.

Though a legatee has the statutory right to bring an action of debt against an executor to recover a specific pecuniary legacy, he is not entitled to judgment unless he proves reception of assets by the executor, making him liable to pay.

Where case is submitted on a written agreed statement of facts containing no

stipulation that decision is to be controlled by the pleadings, it is unnecessary to consider the form or sufficiency thereof.

An executor is not chargeable for the proceeds of real estate until the same are in his hands.

"Assets in hand" are such property as at once comes to the executor, or other trustee, for the purpose of satisfying claims against him as such.

On exceptions. Action of debt to recover the amount of a pecuniary legacy under a will proved and allowed by the Probate Court, where authorized disbursements have exhausted the personal estate and nothing remains except real estate. Judgment of "Plaintiff nonsuit." Exceptions taken by legatee. Exceptions overruled. Case fully appears in the opinion.

Blaisdell & Blaisdell, for plaintiff.

C. J. Hurley, for defendant.

SITTING: BARNES, C. J., STURGIS, THAXTER, HUDSON, MANSER, JJ.

BARNES, C. J. This is an action of debt (R. S., Chap. 78, Sec. 27) to recover the amount of a pecuniary legacy under a will proved and allowed by the Probate Court. It is brought up on an agreed statement of facts, with exhibits attached, upon exceptions by the legatee to judgment of "plaintiff nonsuit," together with a stipulation showing, with other facts not requiring recital here, that defendant, Edward Smith, otherwise known as Edward L. Smith, is the duly qualified executor of the decedent, Hoyt L. Smith, that the Warrant and Inventory returned in said estate showed an appraisal value of decedent's estate in the sum of $5,286.90, as follows: personal estate $1,736.90, and real estate, $3,550.00; that the total of bills paid by the executor to date of the writ herein, including a legacy entitled to preference under clause four of the will, amounts in sum to $2,223.79; that sufficient demand for payment of the legacy sued for had been made before suit; that no claims against said estate have been filed with the executor or in Probate Court; no license for sale of real estate has been issued nor any petition to sell real estate been filed; that the interval of time fixed by statute between the final allowance of this will, and date of bringing suit had elapsed before suit was brought; and, last, that plaintiff herein is

the same person to whom, under paragraph five of said will the sum of five hundred dollars was bequeathed.

The justice below found no evidence or contention that the inventory as stipulated does not include, as herein-above stated, all of the decedent's personal estate, or that the executor realized therefrom more than the appraisal value.

He also found:

> "The total amount paid by the executor for bills and for the legacy bequeathed to Geneva J. Smith, which had priority over the other legacies, is two thousand two hundred twenty-three dollars and seventy-nine cents. The plaintiff does not attack the amount, validity or priority of the claims so paid, and so it is apparent that the personal estate of the deceased which came into the possession of the executor has been exhausted.
>
> "It appears, however, that the appraisal value of the unsold real estate, not specifically devised, is greater than the total amount required to pay in full all of the unpaid legacies; but no license to sell it has been granted or applied for in the probate court, and no power to sell real estate is conferred upon the executor in the will."

The theory on which this suit is brought seems to be that the real estate belonging to Hoyt L. Smith at the time of his decease, although not yet reduced to cash, is assets out of which legacies may now be paid, and hence the executor may be adjudged liable to pay them.

Perhaps as broad a definition as we can find of "assets" of a decedent is that of Justice Story, who says:

> "In an accurate and legal sense, all the personal property of the deceased, which is of a salable nature, and may be converted into ready money, is deemed 'assets,' but the word is not confined to such property; for all other property of the deceased which is chargeable with his debts or legacies, and is applicable to the purpose, is, in a large sense, assets." Story, Eq. Jur., Par. 531.

But, quoting from the same text, at Par. 551:

"Legal assets are such as come into the hands and power of an executor or administrator or such as he is intrusted with by law *virtute officii* to dispose of in the course of his administratorship. In other words, whatever an executor or administrator takes *qua* executor or administratorship, or in respect to his office, is to be considered legal assets." (Italics added.)

Legacies may be an equitable and implied charge upon the real property of an estate.

"A devise of land after payment of debts, is a charge on the land; for, until debts paid, testator gives nothing." *Fenwick* v. *Chapman*, 9 Pet. (U. S.), 471; *Quinby* v. *Frost*, 61 Me., 77.

It is the general rule that where the testator's intention clearly appears that a legacy should be paid at all events, the real estate is made liable, on a deficiency of assets. *Additon* v. *Smith*, 83 Me., 551, 22 A., 470; *Walker* v. *Estate of Follett*, 105 Me., 201, 73 A., 1092.

The residuary clause in the will before the Court: "All the rest, residue and remainder of my property and estate real, personal and mixed of which I may die seized or possessed or to which I may be entitled in any way either in law or in equity or over which I may have testamentary control and wheresoever and howsoever situated, having no children, I give, devise and bequeath to my said cousin Edward Smith, to have and to hold to him and his heirs and assigns forever," is in no sense specific, and is not, therefore, exempt from the usual burden of residuary bequests, namely, payment of all debts and legacies. *Wilcox* v. *Wilcox*, 13 Allen, 252–256.

In re *Strolberg*, 106 Neb., 173, 183 N. W., 97, it is held that an express direction in the will that legacies should be paid out of the personal estate did not necessarily prevent the legacies from being chargeable against the residuary real estate, the court regarding this direction merely as a statement of what the law would otherwise imply, that the personal property was the primary fund for payment of the legacies, as expressed in annotation to the *Strolberg* case in 26 A. L. R., 648.

The present case is not one in equity to determine the legal construction of a will, but it is necessary that the will be construed in order to determine the intention of the testator as collected from the

whole will, examined in the light of the attendant facts which may be supposed to have been in the mind of the testator, for the intention of the testator, if it is not in contravention of some established rule of law or public policy, must be given effect. Maine decisions hereon, assembled, 69 C. J., page 54.

Further, the residuary clause contains no language indicating intent that the real estate should not be resorted to in case of deficiency of personal property.

On the contrary, the residuary clause disposes of all the remainder of the estate, real, personal and mixed, and this remainder is held to be the residue, after debts, expenses of administration, funeral charges, and the expense attendant upon securing and placing over testator's place of burial a "suitable marker," if such expense is approved by the Judge of Probate.

The justice below, however, further found:

"Although the statute confers upon a legatee the right to bring an action of debt against an executor to recover a specific legacy of a pecuniary nature (section 27, chapter 78, R. S., Maine, 1930), yet he is not entitled to judgment unless he proves reception of assets by the executor, making him liable to pay." *Farwell* v. *Jacobs*, 4 Mass., 634; *Smith* v. *Lambert*, 30 Me., 137, 142.

"The plaintiff contends that this unsold real estate constitutes assets out of which these legacies may be paid and so the executor is liable here.

"While this unsold real estate undoubtedly constitutes a part of the assets of the estate of the deceased, yet it is not assets in the hands of the executor. Title thereto is not in the executor, but passed directly to the devisee, subject to be divested as provided by law, and no steps have yet been taken to divest him of that title.

"But, the plaintiff, in effect, contends that the defendant was in duty bound to apply to the probate court for a license to sell this real estate, to raise money with which to pay these legacies, and to settle his account as required by the judge of probate, and failing to do so, should be held liable here.

"Even if it should be made to appear that the executor has

been negligent in the discharge of the duties of his trust (concerning which no opinion is expressed), yet that would not here avail the plaintiff." *Graffam* v. *Ray*, 91 Me., 234, 238.

"The legatee having failed to prove reception of assets by the executor, making him liable to pay, it follows that this action is prematurely brought.

"Since this case is submitted on a written agreed statement of facts containing no stipulation that decision is to be controlled by the pleadings, it is unnecessary to consider the form or sufficiency thereof." *Gardiner* v. *Nutting et al.*, 5 Greenl. (Maine), 140; *Machias Hotel Company* v. *Fisher*, 56 Me. 321; *Esty* v. *Currier*, 98 Mass., 500.

In so finding, the court was clearly right.

Plaintiff brings this action to enforce payment of a particular legacy, admitting by stipulation that the personal estate of the testator has been exhausted, and the only remaining assets, using the word "in a large sense" are parcels of real estate, which under the common law, descend to heirs.

But for many years, without exception that has come to our notice, an executor is not chargeable for the proceeds of real estate until the same are in his hands. *Smith* v. *Lambert*, 30 Me., 137; *Chapman* v. *Chick*, 81 Me., 109, 16 A., 407.

Assets in hand, as defined in 6 C. J. S., 1033, means "Such property as at once comes to the executor, or other trustee, for the purpose of satisfying claims against him as such," citing *Favorite* v. *Booher's, Admr.*, 17 Ohio St., 548, 557.

There remains to be said that nothing in the record charges the executor with negligent delay.

We think the exceptions must be overruled. Whatever rights the plaintiff may have, can be secured in another form of proceeding, but not in this.

Exceptions overruled.

SARAH F. USEN *vs.* CHARLES W. USEN.

York. Opinion, June 8, 1940.

DIVORCE. EQUITY. INJUNCTION. COURTS. HUSBAND AND WIFE.

Objection cannot be made to an amended bill in equity by a demurrer to the bill in its original form.

An appeal from a final decree in equity calls for a review of the whole case, and the appellant is required to present to the appellate court the pleadings, orders, and all evidence before the court below, or an abstract thereof, approved by the justice hearing the case, otherwise the appeal cannot be sustained.

On an appeal in equity, a signed agreement or stipulation of counsel as to what the evidence was at the hearing before the sitting Justice, unapproved, cannot be accepted as a substitute for all evidence before the court below, or an abstract thereof, approved by the justice hearing the case, which is required by statute to be produced.

Findings of a presiding Justice are not the evidence in a case, but only his conclusions from the evidence.

Exceptions to findings of fact by a sitting Justice in equity, and to rulings made below as to the legal effect of facts found, can only be considered when accompanied by the evidence or an abstract thereof, approved in proper manner; for without the evidence, the correctness of the findings of fact and the legal effect thereof cannot be determined.

Exceptions lie to the whole or a part of a final decree, under equity procedure in Maine, as regulated by statute, but, on exceptions to such final decree, the allegations in the bill must be accepted as stating the case presented, without right to the exceptor to dispute any statement of facts well pleaded, thus presenting for determination only the questions of law involved.

A final decree in an equity case is limited by the allegations in the bill, and must be based thereon. Such final decree must not only be limited by and based upon the allegations in the bill, but the decree must be supported by allegations sufficient in and of themselves to present a case entitling the plaintiff to the relief prayed for in the bill, and granted in the decree.

It is a general rule that, upon a sufficient showing of facts, a court of equity in any state may enjoin a citizen of that state from prosecuting a suit against an-

other citizen thereof, in the courts of a sister state. In such a case, equity acts in personam *on the citizen of the state where the court issuing the injunction is located, and without any attempt to interfere directly with the courts of the sister state. This rule has been applied to prevent an evasion of the law of domicile.*

This rule is applied in divorce cases where both parties are domiciled in the same state, to restrain the libelant from further prosecuting divorce proceedings which have been commenced by him in a court of another state, based on his false allegation that he resided there. This jursidiction has been said to rest on the authority vested in the courts of equity.

A case is always in point if the ground upon which decision is actually made and stated in the opinion is the same point presented for decision in the case under consideration.

If a libelant makes a false allegation that he resides at a place within the jurisdiction of the court in which his libel is filed, for the purpose of conferring jurisdiction upon that court, especially in a case where his residence there is absolutely necessary for jurisdictional purposes, that constitutes fraud and such fraud is sufficient ground for injunctive relief.

A libel for a divorce brought in a court of a distant state, by a resident of this state against another resident thereof, and based on a false allegation of residence in the distant state, causes such unusual hardship to the libelee, and calls for such an expense on her part in order for her to make her defense in the state where the libel is pending, as to render the suit there a harassing and vexatious one.

A valid decree of divorce necessarily carries with it the information that it has been judicially determined that the libelee has violated her marriage vows, and that, within the scope of the allegations in the libel, she has been found guilty of some wrong against the libelant; but a void decree stamps her name with an unmerited disgrace.

If a resident of Maine goes to another state for the purpose of obtaining a divorce from his wife, who is also a resident of Maine, for a cause which occurred while the parties lived together in Maine as husband and wife, there would be an evasion of the laws of Maine, and against its public policy, and a divorce thus obtained would be regarded as void and of no effect in Maine.

Full equity jurisdiction was conferred on the Supreme Judicial Court by Chap. 175, *Laws of Maine,* 1874, *and the provisions of that chapter, re-enacted in the various statutory revisions since that time, are now found in R. S., Chap.* 91, *Sec.* 36, *Par. XIV.*

In construing statute providing that Supreme Judicial Court shall have full equity jurisdiction, "according to usage and practice of courts of equity," in all other cases where there is not a plain, adequate, and complete remedy at law, the

quoted phrase was used to direct that the newly granted full equity jurisdiction should be according to usage and practice in equity, rather than according to procedure followed in Supreme Judicial Court in actions at law, and the phrase is not to be construed as a limitation on the grant of full equity jurisdiction, but as a direction as to the course of procedure to be followed.

The full equity jurisdiction of the Supreme Judicial Court is not limited by legislative acts conferring equity powers over certain special subjects, incorporated in statutes enacted before and after the grant of full equity jurisdiction to the Court in 1874, *or by a recital of the phrase "in all other causes."*

One has no plain, adequate remedy at law if no remedy at law is afforded him in the domestic court of the state where he resides.

A legal remedy, to be adequate, must be one which the domestic courts can apply and does not compel the party to go into the courts of a foreign jurisdiction to avail himself of it. This applies in divorce proceedings.

That wife has legal defense to husband's contemplated divorce action in foreign jurisdiction does not defeat her right to enjoin action.

Where husband's divorce proceedings in Florida courts were based upon fraud, husband could not defeat wife's suit to restrain husband from prosecuting divorce proceeding on ground that wife had a plain, adequate remedy at law, since special jurisdiction has been conferred upon the court of equity in cases of fraud.

It is not necessary that it be made to appear that injunction sought, in this particular case, is incidental to, or in aid of some other relief sought.

The Supreme Judicial Court has jurisdiction over a husband and wife and their marriage status, as respects wife's suit to restrain husband from prosecuting divorce proceedings in Florida courts, where wife resided in Maine, and husband was allegedly domiciled therein.

A divorce proceeding brought in a sister state by a citizen of Maine against another citizen of Maine is contrary to law and an infringement not only on rights of spouse who has been sued, but also an infringement on the right of the state to determine the matrimonial status of its own citizens.

The statute giving to a wife a right to maintain a bill against her husband when her separate property is involved does not deny wife the right to seek relief in equity against husband on matters not covered by statute.

According to the fiction of the common law, a husband and wife were regarded as one person, yet they have been considered separate persons in equity and also in divorce proceedings.

An aggrieved spouse is not compelled to seek the courts of another state for the

protection of her marriage status. The court of the state of domicile of the parties is not only able to do that, but has the exclusive right to do it.

A wife who would have been defrauded if her husband had obtained a divorce in Florida courts was not bound to wait until husband obtained divorce, based on his fraud, before seeking relief in equity, especially where both parties were under jurisdiction of Supreme Judicial Court.

A court of equity, with full equity jurisdiction, and special jurisdiction over fraud, may grant relief to a wife against her husband where husband was seeking divorce in Florida courts and wife resided in Maine and husband was allegedly domiciled therein, and divorce, if granted, would have been based on husband's fraudulent allegations respecting his residence, and would have adversely affected wife's personal and property rights.

A wife is not entitled, as a matter of right, to an injunction against her husband who is domiciled in the same state with her, to restrain him from further prosecuting against her in a state where neither of them dwells, a divorce proceeding based on his false allegation that he resides there, as each case must be decided upon its own facts, and it is discretionary with the sitting Justice whether an injunction shall be granted or not. In the absence of an abuse of judicial discretion, the decision of the sitting Justice on that question is not exceptionable.

It is not necessary that it should appear in the final decree that injunction was granted as a matter of right or of discretion. It is sufficient if the decree can be sustained on any legal ground, and it is not reversible unless plainly wrong, or based on error of law.

On appeal and exceptions. Bill in equity brought by Sarah F. Usen against Charles W. Usen to restrain defendant from further prosecuting in a Florida court divorce proceedings brought by defendant against plaintiff. Decree for plaintiff. Defendant appeals and brings exceptions. Exceptions overruled. Appeal dismissed. Decree below affirmed. Case fully appears in the opinion.

John P. Deering,
Maurice Caro,
George E. Gordon, for plaintiff.
Jacob H. Berman,
Edward J. Berman,
John W. Hill, for defendant.

SITTING: BARNES, C. J., STURGIS, HUDSON, MANSER, WORSTER, JJ.

WORSTER, J. On exceptions and appeal in equity. This is a bill in equity brought by a woman residing in this state against her husband, alleged to be domiciled here, to restrain him from further prosecuting, in a chancery court in Florida, a libel for divorce brought by him against her, and now pending there. No other remedy is sought.

This is the second time these parties have been before us. The first time the appeal and exceptions were dismissed without prejudice, and the case remanded for further proceedings, because the record then presented appeared insufficient to confer jurisdiction on this Court to determine the issues raised. *Usen* v. *Usen*, 136 Me., 520, 11 A. (2d), 485.

The defendant challenged the right of the plaintiff to maintain her original bill, by a demurrer inserted in his answer. After the demurrer was filed, and before hearing thereon, paragraphs numbered 7, 8 and 9 of the bill were amended. No exceptions were taken to the allowance of the amendments, and no new demurrer was filed.

Objection cannot be made to an amended bill in equity by a demurrer to the bill in its original form.

As was said in *Witham* v. *Wing et al.*, 108 Me., 364, 81 A., 100:

> "If they had wished to object to the amended bill by demurrer, they should have filed a new demurrer to the amended bill."

Defendant's exception to the overruling of his demurrer to the original bill cannot be sustained.

But the defendant did not rest his case here. After the demurrer was overruled there was a hearing on the amended bill, answer and evidence.

And thereafterwards it was ordered, adjudged and decreed:

> "that the Bill of the Plaintiff, Sarah F. Usen, be and hereby is sustained; that a writ of injunction issue, permanently enjoining the defendant, Charles W. Usen, from prosecuting the action for divorce which is now pending in the Superior Court of the Eleventh Judicial Circuit in and for the County of Dade, Florida."

From this decree the defendant appealed.

An appeal from a final decree in equity calls for a review of the whole case, and the appellant is required to present to the appellate court the pleadings, orders, and "all evidence before the court below, or an abstract thereof, approved by the justice hearing the case . . ."; otherwise the appeal cannot be sustained. R. S., Chap. 91, Sec. 63; *Emery* v. *Bradley*, 88 Me., 357, 34 A., 167; *Redman* v. *Hurley*, 89 Me., 428, 36 A., 906; *Caverly* v. *Small et al.*, 119 Me., 291, 111 A., 300.

In the instant case, neither the "evidence before the court below" nor "an abstract thereof, approved by the justice hearing the case" has been presented.

Evidently counsel attempted to remedy this omission, for it is stated, among other things, in a stipulation signed by them and printed in the record, "that the findings of the Court shall be considered the evidence in the case," but this stipulation does not bear the approval of the sitting Justice.

On an appeal in equity, a signed agreement or stipulation of counsel as to what the evidence was at the hearing before the sitting Justice, unapproved, cannot be accepted as a substitute for "all evidence before the court below, or an abstract thereof, approved by the justice hearing the case . . . ," which is required by statute to be produced. *Sawyer* v. *White*, 125 Me., 206, 132 A., 421.

In the case last cited, the Court said:

> "Counsel have evidently endeavored to make an agreed statement not certified by the sitting Justice take the place of a full record. If this was necessary through inability to procure a transcript of the testimony, the case falls within the *Stenographer Cases*, 100 Maine, 271. *Atwood* v. *New England Tel. & Tel. Co.*, 106 Maine, 539. Any abstract of the evidence before the court below must be approved by the Justice hearing the case."

Moreover, findings of a presiding Justice are not the evidence in a case, but only his conclusions from the evidence.

Therefore, since neither the evidence, nor an abstract thereof approved by the justice who heard the case, has been presented, the defendant's appeal is not properly before us, and must be dismissed.

The defendant, however, relies on the following exceptions:

> "The Court, although finding that there were no property rights involved, sustained the Bill, ruling as a matter of law that a wife may bring a Bill in Equity against her husband even though no property rights are involved, to restrain her husband from proceeding in an action for divorce in another jurisdiction . . . and to the ruling of law on the part of the Court in sustaining the Bill, the Respondent, being aggrieved, respectfully claims an exception. . . ."

But exceptions to findings of fact by a sitting Justice in equity, and to rulings made below as to the legal effect of facts found, can only be considered when accompanied by the evidence or an abstract thereof, approved in the manner aforesaid (neither of which is before us); for without the evidence, the correctness of the findings of fact and the legal effect thereof cannot be determined. Therefore, it follows that the defendant's exceptions to such findings and rulings cannot be sustained.

The defendant, however, excepts to the ruling found in the final decree, sustaining the plaintiff's bill, and this exception must be considered as an exception to that decree.

Exceptions lie to the whole or a part of a final decree, under equity procedure in Maine, as regulated by statute. *Emery* v. *Bradley*, supra.

But, on exceptions to such final decree, the allegations in the bill must be accepted as stating the case presented, without right to the exceptor to dispute any statement of facts well pleaded, thus presenting for determination only the questions of law involved. *Emery* v. *Bradley*, supra.

In the case last cited, it was contended that "the only mode of obtaining a review by the law court of any part of the final decree is by appeal." But Emery, J., in the opinion, said:

> "The equity procedure act, however, seems to contemplate exceptions to a final decree, whatever may be the general rule. . . . Of course, exceptions to any part of a final decree can only present a question of law. No questions of fact are open for consideration upon exceptions."

That a final decree in an equity case is limited by the allegations in the bill, and must be based thereon, is well settled. *Emery* v. *Bradley*, supra; *Stover* v. *Poole et al.*, 67 Me., 217; *Merrill et al.* v. *Washburn*, 83 Me., 189, 22 A., 118; See, also, *Buswell* v. *Wentworth et al.*, 134 Me., 383, at 391, 186 A., 803.

Moreover, such final decree must not only be limited by and based upon the allegations in the bill, but the decree must be supported by allegations sufficient in and of themselves to present a case entitling the plaintiff to the relief prayed for in the bill, and granted in the decree.

In considering an exception to a single clause in the final decree in *Emery* v. *Bradley*, supra, Emery, J. said:

> "The question of law presented by the exception is evidently this: whether the plaintiff's bill contains allegations sufficient to support that clause of the final decree excepted to."

A like question is presented here, which must be determined by a consideration of the allegations set forth in the plaintiff's bill.

While to set forth the whole bill would serve no useful purpose, yet, even at the expense of extending the length of this opinion, the greater part of the bill must be printed in order to present the situation as it is alleged to be, and in order that the principles of law involved may be properly applied to the stated case. By a brief summary of parts of the bill, and quotations from other parts, the case presented by the amended bill may be stated as follows:

That the plaintiff and defendant were married in Boston in 1917 (or, as stated in the libel in the Florida case which is made a part of the bill, in 1907), and lived together in Old Orchard Beach, Maine, for twenty-two years previous to December, 1938, "when the defendant unjustly and without cause wrongfully and wilfully deserted the plaintiff, which desertion has continued up to" the date of the bill, April 11, 1939.

That "no children were born of said marriage."

That they "purchased property in the Town of Old Orchard Beach and constructed and established stores, cottages, apartments and places of amusement, all of which property is now owned by corporation called Usen Amusements, Inc. formed about the year 1931, of which the plaintiff is Treasurer and the defendant Presi-

dent and Manager, and in which the plaintiff and defendant each own four hundred ninety-nine shares."

That they "have had the care, supervision and management of the property, the renting of the stores, concessions, apartments and cottages, the management of a large roller coaster, theater, dance hall, roller skating rink and other property and amusements of varying kinds, the proper and successful management of which requires the full time, personal attention of both the plaintiff and defendant from the first of March to the first of December of each year, and during the balance of the year it is necessary for said Charles W. Usen and Sarah F. Usen to devote some of their time and labor to the care of the property necessary to be kept in good condition, and to make preparation for its operation during the coming season."

That on April 20, 1938, the defendant entered into a written contract with said corporation, which expires April 20, 1941, wherein he became "obligated to devote his entire time to the management of said business during the operating period and such time as is necessary for the successful operation of the business during the other portions of the year."

That about January 15, 1939, the defendant went to Florida, and about March 10, 1939, there was prepared and signed a libel for divorce in "the Circuit Court of the 11th Judicial Circuit of Florida in and for Dade County, in Chancery, praying for a divorce from the plaintiff and alleging as grounds for divorce that the plaintiff had been guilty of violent and ungovernable temper and extreme cruelty, the latter ground only being a ground for divorce in the State of Maine." And on March 27 of that year an attested copy of said libel "together with a summons to appear and defend said bill, was served upon the plaintiff in said Old Orchard Beach."

That "the causes for divorce, as alleged in said libel for divorce . . . are false and without foundation."

It is further stated in the amended bill that:

> "NINTH: The plaintiff and the defendant have never resided in the State of Florida as husband and wife, and said Charles W. Usen is now and has always been a resident of the State of Maine, and domiciled therein since 1920, and has

falsely alleged in his bill for divorce that he has resided in Florida for more than ninety days previous to the filing of the bill, and the plaintiff further alleges that said Charles W. Usen has no property or other interests in the State of Florida, but that all of his business interests are in Old Orchard Beach in the County of York, and that he has falsely claimed his residence in the State of Florida for the sole purpose of obtaining a divorce from the plaintiff.

"TENTH: The plaintiff further alleges that until the very end of the year 1938, said Charles W. Usen urged the plaintiff Sarah F. Usen to file a libel for divorce against him in the State of Maine, and offered her large sums of money for alimony and expenses if she would proceed to obtain a divorce from him in this state and the said Sarah F. Usen refused to do so.

"ELEVENTH: The plaintiff further alleges that all of the controversies and troubles that have arisen between her and the said Charles W. Usen have resulted from her refusal to file a libel for divorce in the State of Maine, in accordance with his urgent request, as set forth in the preceding paragraph."

"THIRTEENTH: The plaintiff further alleges that although a decree of divorce in Florida under these circumstances might be void under the laws of this state, it would, if granted, cause her great pain and suffering, personal embarrassment and humiliation, would adversely affect her personal and property rights, and in every respect cause her an irreparable injury.

"FOURTEENTH: The plaintiff further alleges that in order successfully to contest said divorce, now pending in the Courts in Dade County, Florida, it will be necessary for her to spend large sums of money to pay counsel fees in Florida and to pay traveling and other expenses of herself and her witnesses.

"FIFTEENTH: The plaintiff has no plain, adequate and complete remedy at law."

The bill concludes with a prayer for general relief, and that the defendant, his agents, attorneys and representatives be temporarily and permanently enjoined from "prosecuting, or causing to be prosecuted, the divorce proceedings now pending in the Circuit Court for the 11th Judicial District of Dade County, Florida," and that "the defendant be ordered to dismiss to cause to be dismissed, said divorce proceedings."

Do these allegations present such a case as entitles the plaintiff to the injunctive relief prayed for, and granted in the final decree?

It is a general rule that, upon a sufficient showing of facts, a court of equity in any state may enjoin a citizen of that state from prosecuting a suit against another citizen thereof, in the courts of a sister state. In such a case, equity acts *in personam* on the citizen of the state where the court issuing the injunction is located, and without any attempt to interfere directly with the courts of the sister state. 5 Pomeroy's Equity Jurisprudence, sec. 2091; 14 Ruling Case Law, p. 412, *et seq.*

This rule has been applied to prevent an evasion of the law of domicile (*Oates* v. *Morningside College*, 217 Iowa, 1059, 252 N. W., 783, 91 A. L. R., 563; *Pere Marquette Ry. Co.* v. *Slutz*, 268 Mich., 388, 256 N. W., 458; *Culp* v. *Butler*, 69 Ind. App., 668, 122 N. E., 684); to prevent great hardship and expense in defending in the sister state (*Kern et al.* v. *Cleveland C., C. & St. L. Ry. Co. et al.*, 204 Ind., 595, 185 N. E., 446); to prevent one citizen from obtaining an inequitable advantage over another (*Hawkins* v. *Ireland et al.*, 64 Minn., 339, 67 N. W., 73, 58 Am. St. Rep., 534); and where the suit in the other state would work great wrong and injury to others (*Columbian National Life Insurance Co.* v. *Cross* [Mass.], 9 N. E. [2d.]), 402, citing with approval *Dehon* v. *Foster*, 4 Allen, 545, 7 Allen, 57; *Cunningham et al.* v. *Butler et al.*, 142 Mass., 47, 6 N. E., 782).

The same rule is applied in divorce cases where both parties are domiciled in the same state, to restrain the libelant from further prosecuting divorce proceedings which have been commenced by him in a court of another state, based on his false allegation that he resided there. 2 High on Injunctions, sec. 1401a; 5 Pomeroy's Equity Jurisprudence, sec. 2091; 9 Ruling Case Law, p. 523; 19 Corpus Juris, p. 106; *Kempson* v. *Kempson*, 58 N. J. E., 94, 43 A., 97;

Kempson v. *Kempson*, 61 N. J. E., 303, 48 A., 244 modified and affirmed in 63 N. J. E., 783, 52 A., 360, 625; *Huettinger* v. *Huettinger* (N. J. E.), 43 A., 574; *Von Bernuth* v. *Von Bernuth*, 76 N. J. E., 177, 73 A., 1049, 139 Am. St. Rep., 752; *Miller* v. *Miller*, 66 N. J. E., 436, 58 A., 188; *Forrest* v. *Forrest*, 2 Edm. Sel. Cas. (N. Y.), 180; *Gwathmey* v. *Gwathmey*, 190 N. Y. S., 199, aff. 193 N. Y. S., 935; *Greenberg* v. *Greenberg*, 218 N. Y. S., 87; *Johnson* v. *Johnson*, 261 N. Y. S., 523; *Jeffe* v. *Jeffe*, 4 N. Y. S. (2d), 628; See, also, *Cherry* v. *Cherry*, 253 Mass., 172, 148 N. E., 570; and *Borda* v. *Borda*, 44 R. I., 337, 117 A., 362.

And this jurisdiction has been said to rest

> ". . . on the authority vested in courts of equity over persons within the limits of their own jurisdiction to restrain them from doing inequitable acts to the wrong and injury of others, and on the power of the state to compel its own citizens to respect its laws even beyond its own territorial limits. 14 R. C. L., pp. 412, 413." *Johnson* v. *Johnson*, supra; See, also, other cases cited above.

The *Kempson* cases hereinbefore cited are greatly relied on by the plaintiff. The principals in those cases were before the court three times. We are not, however, concerned here with that aspect of the second *Kempson* case which deals with the sufficiency of service of notice on the defendant that an injunction had been issued against him; or with the punishment inflicted upon him for his violation thereof.

Here we are primarily concerned with the right of the court to issue the injunction in the first instance. It was held in the first *Kempson* case, as stated in one of the headnotes, that:

> "A complaint by a wife alleging that her husband, whose residence was in New Jersey, had gone to North Dakota, and, after a pretended residence there for a few months, commenced a suit against her for divorce, presents a case so inequitable as justifies a court of equity in the former state restraining its prosecution."

And it was there advised that injunction issue against the defendant, but, in spite of the injunctive order, Mr. Kempson proceeded

with his suit in North Dakota, and there procured a divorce.

Subsequently, at a hearing on a motion of his wife (the second case), he was found guilty of contempt in disobeying the injunction, and was ordered to pay a fine and to "take proper and efficient methods to open and set aside the decree. . . ." But, since the defendant had no power, himself, so to do, the order was modified by a divided court on appeal (the third case), by requiring him to present the truth to the North Dakota court, and to urge in good faith that its decree be set aside.

The defendant in the instant case, however, earnestly contends that the *Kempson* cases are not in point, because in those cases children and property were involved, whereas in the case at bar there are no children, and no questions involving property rights are at issue. And he argues that since there are no property rights at issue here, the plaintiff cannot maintain this bill against him.

But the bill before us sets forth quite fully the property interests of the parties, from which may be drawn the inference that the business success of each of them depends upon the success of the corporation which has acquired the property of each, and in which they are equal shareholders. Moreover, the plaintiff's bill contains a direct allegation that if the divorce should be granted in Florida, it "would adversely affect her personal and property rights, and in every respect cause her an irreparable injury."

And it is difficult to conceive of a divorce case between parties each of whom owns such a large number of shares of stock in a corporation carrying on such a large business as this one, and possessing so much real and personal property, in which property rights would not, at some time, be involved. See *Henry* v. *Henry*, 104 N. J. E., 21, 144 A., 18; and *Holmes* v. *Holmes*, 63 Me., 420.

However, even if it should be considered that the bill does not set forth a case calling for the assistance of the equity court at this time, to preserve the separate property of the plaintiff, yet that would not render the *Kempson* cases inapplicable.

The fact that the Kempsons had both children and property was not the basis of the decision rendered there. Those cases were not decided on the issue of children and property, but, as stated in the first *Kempson* case:

"In the case in hand the complainant's right to relief *rests solely* upon the ground that the conduct of her husband while domiciled in New Jersey, in going to Dakota and gaining a nominal or pretended residence there for a few months, and commencing a suit against her there based on such pretended residence, is so far inequitable and unjust as to merit the interference of a court of equity." (The underscoring is ours.)

So, since the *Kempson* cases were not decided on issues concerning children or property, but solely on the presented issue of injustice to and hardship on the plaintiff, arising from the fraudulent conduct of the defendant, (which is exactly what the plaintiff in the instant case claims she has shown in her bill), it follows that the issue decided there is like that presented here. A case is always in point if the ground upon which decision is actually made and stated in the opinion is the same point presented for decision in the case under consideration. The *Kempson* cases are, therefore, in point.

Nor do those cases stand alone. The principle there laid down is supported by other cases cited above with the *Kempson* cases.

Now, since questions of fact cannot be controverted in the instant case for reasons above stated, decision must be made on the case presented by the plaintiff in her bill, although the allegations will not be considered in the order in which they appear therein.

It appears from the bill that the defendant, having a residence in this state, brought a libel for divorce in a Florida court, against this plaintiff, also a resident of this state, based on his false allegation that he resided in Florida.

If a libelant makes a false allegation that he resides at a place within the jurisdiction of the court in which his libel is filed, for the purpose of conferring jurisdiction upon that court, especially in a case where his residence there is absolutely necessary for jurisdictional purposes, that constitutes fraud. *Kempson* v. *Kempson* (first case), supra; *Holmes* v. *Holmes*, supra.

And it has been said that such fraud is sufficient ground for injunctive relief. In 9 Ruling Case Law, page 523, the rule is laid down as follows:

"It has been held that if the husband and wife have their matrimonial domicile within the state where she resides, she

may there enjoin him from prosecuting a suit for divorce in another state based on a false allegation of his residence in that state, . . ."

Moreover, in such circumstances, a libel for a divorce brought in a court of a distant state, by a resident of this state against another resident thereof, causes such unusual hardship to the libelee, and calls for such an expense on her part in order for her to make her defense in the state where the libel is pending, as to render the suit there a harassing and vexatious one.

In *Gwathmey* v. *Gwathmey*, supra, on bill in equity brought by the wife, the husband was enjoined from further prosecuting in Florida a divorce proceeding he had there commenced against her, on the ground that he had not acquired the necessary residence there. Donnelly, J., there stated:

"This court has power to restrain him from carrying on an inequitable, harassing and vexatious suit in another jurisdiction . . ."

In *Von Bernuth* v. *Von Bernuth*, supra, the first *Kempson* case and the *Huettinger* case were referred to. In speaking of the *Kempson* case, Howell, V. C., said that the husband was enjoined

". . . from prosecuting a suit for divorce against his wife in a foreign state upon a satisfactory allegation of fraud, which consisted of the husband's allegation that he was a resident of such foreign state, whereas as a matter of fact he was a resident of New Jersey. In this case the jurisdiction was exercised upon the ground of fraud, and upon the further ground that the wife was put to the trouble and expense of appearing in a foreign state to resist her husband's claim, thus making the foreign proceeding a vexatious one."

The plaintiff here has brought her case within this rule by the allegation in her bill that:

". . . in order successfully to contest said divorce, . . . it will be necessary for her to spend large sums of money to pay counsel fees in Florida and to pay traveling and other expenses of herself and her witnesses."

So this bill presents not only a case of fraud on the part of the defendant in falsely alleging his residence in Florida, in order to give jurisdiction to the court there, but a case of hardship on the plaintiff, caused by the defendant's fraudulent conduct.

In commenting on the first *Kempson* case, which presented a like situation, it is stated in 33 Harvard Law Review, at page 92, that:

> "In the much-discussed case of *Kempson* v. *Kempson*, the court granted an injunction, and properly so, since the facts disclosed not only hardship but also fraudulent conduct."

It is also alleged in the bill that this defendant "unjustly and without cause wrongfully and wilfully deserted the plaintiff, which desertion has continued up to this time."

It is further stated in the bill that "the causes for divorce, as alleged in said libel for divorce . . . are false and without foundation"; and that "although a decree of divorce in Florida under these circumstances might be void under the laws of this state, it would, if granted, cause her great pain and suffering, personal embarrassment and humiliation, would adversely affect her personal and property rights, and in every respect cause her an irreparable injury."

It is stated, in 2 High on Injunctions, section 1401a, that:

> "Where a husband or wife leaves the state of their domicile and goes to a foreign state and there secures a mere nominal or colorable residence for the purpose of bringing divorce proceedings, such a case of injustice and irreparable injury is made out as to entitle the aggrieved spouse to an injunction restraining the other from prosecuting divorce proceedings in that state based upon such pretended domicile."

Even a void decree of divorce would necessarily affect the libelee. Undoubtedly it would cause not only confusion and uncertainty as to the status of both parties, but may well cause this plaintiff embarrassment, humiliation and suffering, as alleged, resulting in irreparable injury to her.

A valid decree of divorce necessarily carries with it the information that it has been judicially determined that the libelee has violated her marriage vows, and that, within the scope of the allegations in the libel, she has been found guilty of some wrong against

the libelant; but a void decree stamps "her name, it may be, with an unmerited disgrace." *Holmes* v. *Holmes*, supra. See, also, *Greenberg* v. *Greenberg*, supra; and *Johnson* v. *Johnson*, supra.

In *Forrest* v. *Forrest*, supra, the court said:

"It is manifest, from the facts as they are spread before me, that the defendant cannot obtain, in his suit in Pennsylvania, a decree which can be binding on his wife here. Would it be right to subject her unnecessarily to the harassing evils of even an invalid decree, or compel her to expend the allowance made to her by her husband, in resisting the granting of such a decree?"

The court, in *Jeffe* v. *Jeffe*, supra, says:

"To deprive the plaintiff of her status by fraudulent resort to a foreign jurisdiction; to impose upon her the burden of defending her rights in any part of the country which the defendant may select as a forum; to cast upon her the suspicion that she was guilty of a misconduct justifying a divorce in this state, all point to a direct and immediate invasion of her rights, to protect which equity will award injunctive relief . . ."

As pointed out by Mr. Greenleaf, it is

". . . essential to the peace of society that questions of this kind should not be left doubtful, but that the domestic and social relations of every member of the community should be clearly defined and conclusively settled and at rest." 1 Greenleaf on Evidence, sec. 525.

And if a divorce should be granted in Florida which would be valid there and void in Maine, so that the parties might lawfully remarry in one state and not in the other, the status of the parties would not only be definitely unsettled, but actually intolerable. *Johnson* v. *Johnson*, supra.

It further appears in the bill that the plaintiff and defendant are married; that they have never resided in Florida as husband and wife; that they lived together in Old Orchard Beach, Maine, for twenty-two years prior to December, 1938, when the defendant un-

justly deserted the plaintiff, and, about January 15, 1939, went to Florida, where he commenced said libel for divorce against his wife about March 10, 1939, which was served upon her the 27th day of the same month. The only reasonable inference to be drawn from this statement of facts is that the defendant seeks a divorce in Florida for causes alleged to have occurred in the State of Maine, while they lived here together as husband and wife. And since it also appears from the bill that the divorce proceeding is based upon his false allegation of residence in Florida, made for the sole purpose of obtaining a divorce there on grounds stated by the plaintiff in her bill to be false, the conclusion is irresistible that he sought thereby to gain some inequitable advantage over her, and, by evading the laws of this state, to procure a divorce in Florida which would be contrary to the public policy of this state.

As was said in *Johnson* v. *Johnson*, supra,

> "For no apparent reason, except the gratification of his own desires, he is seeking to discard a wife who has done no wrong. He should not be permitted to consummate his scheme of evasion of the laws of his own state and place his aggrieved wife in a situation where she must defend herself against a judgment fraudulently obtained."

In a comment on the first *Kempson* case, in 15 Harvard Law Review, at page 145, is found this pertinent remark:

> "The issue of the injunction seems justifiable in view of the fact that the result of the foreign suit would in all probability, as was intended, be an avoidance of the laws of the parties' domicil."

If a resident of this state goes to another state for the purpose of obtaining a divorce from his wife, who is also a resident of this state, for a cause which occurred here while the parties lived together here as husband and wife, that would be an evasion of the laws of this state, and against its public policy, and a divorce thus obtained would be regarded as void and of no effect in this state. 32 Corpus Juris., pp. 116, 117, 118; *Johnson* v. *Johnson*, supra; *Gregory* v. *Gregory*, 78 Me., 187, 3 A., 280, 57 Am. Rep., 792.

It is here provided by statute that:

> "When residents of the state go out of it for the purpose of obtaining a divorce for causes which occurred here while the parties lived here, or which do not authorize a divorce here, and a divorce is thus obtained, it shall be void in this state. . ." R. S., Chap. 73, Sec. 12.

And in *Gregory* v. *Gregory*, supra, it was held that courts of other states have no authority to decree a divorce between citizens of this state.

The defendant, however, contends, in effect, that this court has no jurisdiction in this case, because full equity jurisdiction was granted to it in 1874, only "according to the usage and practice of courts of equity" at that time, and since no action could then have been maintained in equity by a wife against her husband, the statute cannot be construed so as to give this court jurisdiction of this case.

Full equity jurisdiction was conferred on this court by Chapter 175, Laws of Maine, 1874, and the provisions of that chapter, re-enacted in the various statutory revisions since that time, are now found in R. S., Chap. 91, Sec. 36, Par. XIV.

That paragraph reads as follows:

> "And have full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law."

In construing this paragraph, the dual capacity of the court must always be borne in mind. At the time this statute was first enacted, this court was exercising limited equity powers, and at the same time had jurisdiction of actions at law, and this phrase was undoubtedly used to direct that the then newly granted "full equity jurisdiction" should be according to the usage and practice in equity, rather than according to the procedure followed in the same court in actions of law. It would be illogical and inconsistent to construe this phrase as a limitation on the full equity jurisdiction granted by the legislature. A granted power could not be both full and limited at the same time and in the same field.

Therefore, this phrase is not to be construed as a limitation on the grant of full equity jurisdiction, but, rather, as a direction as to the course of procedure to be followed. 1 Pomeroy's Equity Juris-

prudence (4th ed.), sec. 41; 1 Story's Equity Jurisprudence (13th ed.), p. 55, sec. 58; 4 Kent's Commentaries (14th ed.), p. 189, note.

This dual capacity of the court is clearly pointed out in section 41 of Pomeroy's Equity Jurisprudence, *supra*, where it is said:

> ". . . in most of the states which have not adopted the reform procedure, the two departments of law and equity are still maintained distinct in their rules, in their procedure, and in their remedies; but the jurisdiction to administer both systems is possessed and exercised by the same tribunal, which in one case acts as a court of law, and in the other as a court of equity. . . . The procedure at law is based, . . . upon the old common-law method, and retains in whole or in part the ancient forms of action. The equity procedure is the same in its essential principles with that which long prevailed in the English Court of Chancery, but is much simplified in its details and rules."

Nor is the full equity jurisdiction of this court limited by legislative acts conferring equity powers over certain special subjects, incorporated in statutes enacted before and after the grant of full equity jurisdiction to the court in 1874, or by a recital of the phrase "in all other causes."

In *Woodbury* v. *Gardner et al.*, 77 Me., 68, Virgin, J., said:

> "In this state, the early equity jurisdiction of the court was limited to a very few subjects. It was gradually from time to time extended to others, until 1874, when the legislature conferred 'full equity jurisdiction according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law.' St. 1874, c. 175. And notwithstanding the clause — 'in all other cases,' the re-enactment of this statute in R. S., (1883) c. 77 § 6, was not intended to be limited in effect by reason of its being accompanied by a re-enactment of the various restricted provisions of the former statutes."

It is further urged for the defendant that the plaintiff is not entitled to relief in equity because she may appear in the Florida court and there defend the libel brought against her by her husband, and

so she has a plain, adequate remedy at law. This contention cannot be sustained.

One has no plain, adequate remedy at law if no remedy at law is afforded him in the domestic court of the state where he resides.

The rule is laid down in 19 Am. Jur., at page 115, as follows:

> "A legal remedy, to be adequate, must be one which the domestic courts can apply and does not compel the party to go into the courts of a foreign jurisdiction to avail himself of it." In support of this statement is cited *Cummings ex rel. Eliott* v. *Lake Torpedo Boat Co.* (*State ex rel. Eliott & Co.* v. *Lake Torpedo Boat Co.*), 90 Conn., 638, 98 A., 580, L. R. A., 1916F., 1033.

In the case last cited, proceedings were had in a court in Connecticut, to compel the respondent to allow an inspection of the stock books and records of the defendant corporation, which had been organized under Maine laws. It was there argued that the plaintiffs "have an adequate remedy at law by proceedings in the State of Maine."

The court said:

> "But such a remedy is not an adequate legal remedy. In *Stanton* v. *Embry*, 46 Conn., 595, 601, we said that a legal remedy to be adequate must be one which our own courts can apply, and does not compel the party to go into the courts of a foreign jurisdiction to avail himself of it."

This same rule has been applied in divorce proceedings. *Johnson* v. *Johnson*, supra.

One of the headnotes in the case last cited is as follows:

> "That wife has legal defense to husband's contemplated divorce action in foreign jurisdiction does not defeat her right to enjoin action."

Moreover, even if the plaintiff had a plain, adequate remedy at law, that would avail the defendant nothing, because special jurisdiction has been conferred upon the court of equity in cases of fraud. R. S., Chap. 91, Sec. 36, Par. IV. See, also, 19 Am. Jur., p. 63, Sec. 39.

And the defendant's proceeding in Florida, which we are now considering, is based on fraud, from which it is claimed all of the hardship, inequity and injustice to the plaintiff flow.

In *Merrill* v. *McLaughlin et al.*, 75 Me., 64, at 69, Virgin, J., said:

> "It is urged that the plaintiff has a plain, adequate and complete remedy at law, and that, therefore, this bill in equity cannot be maintained. But fraud being the gravamen of the complaint, equity and law have a concurrent jurisdiction with certain exceptions which do not include this case."

It is not necessary that it be made to appear that the injunction sought here is merely incidental to, or in aid of some other relief sought. *Henry* v. *Henry*, supra; *Gross* v. *Gross* (N. J. Chancery, 1935), 180 A., 204.

In the case last cited, it is stated in a headnote that:

> "In proper case where matrimonial res is in state, bill will lie to enjoin proceedings for divorce in foreign jurisdiction, although such bill is not incidental to, or in aid of, any other relief."

The marriage state is frequently referred to as the "matrimonial res," as in the case last cited. *Delanoy* v. *Delanoy*, 216 Cal., 27, 13 P. (2d), 719, 86 A. L. R., 1321, at 1324; See Bishop on Marriage, Divorce and Separation, Vol. 1, Sec. 23, *et seq.*

Speaking from the angle of a judgment rendered in a divorce case, it is said, in 17 Am. Jur., at page 152, that:

> "The res upon which the judgment operates is the status of the parties."

It has been claimed, however, that the "marriage res" is so intangible as to have no actual situs (1 Beale on Conflict of Laws, page 485); but, for the purposes of this case, it is not necessary to enter into a discussion of that phase of this topic, for there is no need to base our decision here on a matrimonial situs.

This court has jurisdiction over both the plaintiff and the defendant, and their marriage status.

And we are in no doubt as to what that marriage status is in this state.

It is said in 18 Ruling Case Law, at page 384, that:

> "Some courts have gone to the extent of holding that marriage is not a contract but a status created by mutual consent of one man and one woman and that the rights and obligations of the parties are not contractual, but are fixed, changed or dissolved by law."

In support of that statement cases are cited, including *Gregory* v. *Gregory*, supra.

In the *Gregory* case, Emery, J., said:

> "Marriage is a civil status. The rights and obligations of the parties are not merely contractual, but are fixed, changed or dissolved by law. In case of a conflict of laws, the lex domicilii controls the status of the person, though his contractual or property rights may be subject to other laws. The state has the absolute right to determine or alter the civil status of all its inhabitants. No matter where they may temporarily be, and no matter where the contracts or acts giving rise to such status may have been made or done. Other states or countries will in this matter accept without question the decrees of the courts of the home state. . . .
>
> "But the state has this power only over its own inhabitants. The mere presence within its territory of the inhabitants of other states gives it no authority to fix or change their status. The state of their residence still retains its control over that. It alone can free its citizens from marital obligations. Any proceedings of another state to that end will be ineffectual and will be disregarded elsewhere."

There can be no question but that the public is greatly concerned in the marriage status or res, for that is the very foundation of our social structure. Not every one can enter into that status at pleasure, because of statutory regulations; and having entered into it neither one, nor both of the parties can, of themselves alone, dissolve it; but, for that purpose, must appeal to a competent court having jurisdiction of the parties, which, in turn, is limited to certain statutory causes.

And each person included in such marriage status has the abso-

lute right to insist that the status of which he or she is a part shall continue inviolate until dissolved by death or according to the law of the land. Moreover, that is one of the most important rights we have; and here that right of the plaintiff has been attacked by the defendant, by fraud.

Since the courts of this state alone can dissolve a marriage of its citizens dwelling within its borders, it follows that a divorce proceeding brought by one of its citizens against another, in a sister state, is contrary to law, and so an infringement not only on the rights of the spouse who has been sued, but also an infringement on the right of the state to determine the matrimonial status of its own citizens.

But the defendant strenuously contends that the common-law disability of a married woman has not been so far removed by statute as to permit the plaintiff to maintain such a proceeding as this against her husband; that she cannot invoke the statute permitting her to maintain a bill against her husband in connection with her separate property, because no such property is involved here; and so her bill should be dismissed.

We have not overlooked the Maine cases cited by the defendant, bearing on a married woman's incapacity to maintain an action at law against her husband for tort, or on contract, or for possession of property, or against his employer for damages for injuries caused by the husband's negligence. Those cases are not in point. This is not an action at law, and the wife is not seeking to recover damages or property.

Nor are those cases in point in which a court of equity dealt with the statutory right of a wife to maintain a bill in equity against her husband for protection of her separate property and rights, and matters arising therefrom; because no such relief is sought here.

It was said in *Henry* v. *Henry*, supra, that

> "The notion that a court of equity is primarily concerned only with property rights is met by the circumstance that in this state the rights arising from a marriage contract necessarily embrace property rights."

But we pass this point, and the suggestion of our own court in *Holmes* v. *Holmes*, supra, relative to the effect of a divorce ob-

tained by fraud on the wife's right to support from her husband, and her right to what was then dower, now title by descent, in his estate upon his death; because the matter strikes deeper than those things. And the case may well be decided without even considering the effect of the statute giving to the wife a right to maintain a bill against her husband when her separate property is involved.

That statute does not, expressly or by implication, deny her the right to seek any relief in equity, on matters not covered by the statute, which she might have, if any.

The plaintiff does not seek here to compel the defendant to perform his marital duties, or to restrain him from improperly performing them, or to compel him to do any act whatsoever which requires any oversight in the performance thereof. She does not even seek to restrain him from bringing a divorce libel against her in the state in which they are both domiciled. All she seeks in this proceeding is to restrain him from further prosecuting against her in another state, where neither of them resides, a divorce case based on his false statement of his residence there, and in which no divorce could be granted that would be recognized as valid in the state where they live.

It cannot be that this plaintiff lacks capacity to seek relief here from such an intolerable situation as has been described, brought about by the defendant in a divorce action based on his own fraud, in which she would undoubtedly have capacity to defend on the ground of the same fraud complained of here, if she should be compelled to go to Florida to present her defense.

While, according to the fiction of the common law, a husband and wife were regarded as one person, yet they have been considered separate persons in equity. 2 Story's Equity Jurisprudence (13th ed.), p. 699; *Blake* v. *Blake*, 64 Me., 177, 182; 30 Corpus Juris, p. 951.

And surely they have been, and are, regarded as separate persons in divorce proceedings. Otherwise one spouse could not maintain a libel for divorce against the other.

And not only are they considered separate persons in divorce cases, but they have been regarded as distinct persons in proceedings brought for the annulment of divorces which had been obtained by fraud.

In *Holmes* v. *Holmes*, supra, a wife brought a petition in the Supreme Judicial Court in our County of York, for an annulment of a decree of divorce which her husband had by fraud procured against her at some previous term of that court. The husband had remarried. The defendant contended that a new trial could not be granted under the statute after one of the parties had contracted a new marriage, and that, therefore, the petition for annulment should be denied. But that contention was overruled by the court and the decree of divorce was annulled.

Peters, J., said:

> "But this position cannot be sustained. A new trial is not asked for. If this motion prevails, none can be had. It cuts deeper than that. It seeks to nullify a previous proceeding. . . . It is not a motion to review or reverse, but to vacate a judgment, on account of a fraud practiced upon the court, injurious to a party who has not been heard."

It is also stated in the opinion that:

> ". . . if a decree fraudulently obtained cannot be vacated, then the court can be used by a reckless man as an instrumentality to deprive an innocent wife of a support from her husband, of the right to dower in his estate, of the possession of her children, besides stamping her name, it may be, with an unmerited disgrace. Such a retribution should not fall upon her at least."

And the same rule has been successfully invoked by a husband seeking annulment of a decree of divorce obtained by his wife by fraud. *Lord* v. *Lord*, 66 Me., 265.

Although the petitioner in the last named case prayed for a review, yet the court said:

> "He evidently does not use the word review in the technical sense of a new trial under the statutes pertaining to a review, but in the sense of a re-hearing or re-examination, as incidental to his motion to set the decree wholly aside as having been obtained by fraud. The kind of review asked for is, that the proceedings be annulled."

In the case of *Hills* v. *Hills*, 76 Me., 486, Peters, C. J., in referring to *Holmes* v. *Holmes*, supra, and *Lord* v. *Lord*, supra, said:

> These "were cases in which the court recognized the existence of a right, not to grant a new trial, but to wholly annul a decree for a fraud practiced upon the court in obtaining a jurisdiction for divorce."

The same explanatory quotation is found in *Simpson* v. *Simpson*, 119 Me., 14, 109 A., 254.

And in *Leathers* v. *Stewart*, 108 Me., 96, 79 A., 16, Savage, J., said:

> "The apparent jurisdiction thus induced by fraud is colorable only.
>
> "And no doubt exists that in such cases the court may, and in proper cases should, vacate the decree of divorce on the petition of the defrauded spouse. . . And this may be done though the libellant has contracted a new marriage since the first one was dissolved."

It is apparent from the Maine cases last quoted that the right to petition a court in this state for the annulment of a divorce obtained by fraud was not based on statutory provisions allowing a new trial in divorce cases in certain circumstances; but on the inherent, natural right of an aggrieved spouse to apply directly to the court in which the fraud had been perpetrated by the other spouse, for such annulment. Neither party lacks capacity to maintain such a proceeding against the other, even although the result thereof leaves them still occupying the position of husband and wife, respectively.

When, however, such fraudulent divorce has not been obtained in the state where both parties reside, but in another state where neither lives, the aggrieved spouse cannot file her petition in a court in the state of their domicile for an annulment of such divorce. That form of remedy must be sought in the court in the sister state in which the divorce was granted. But an aggrieved spouse is not compelled to seek the courts of another state for the protection of her marriage status. The court of the state of domicile of the parties is not only able to do that, but has the exclusive right to do it.

Since, then, an aggrieved spouse cannot obtain relief by petition to a court in the state where the parties reside, when a divorce has been obtained in a distant state by fraud, and in evasion of the laws of the domicile of the parties, the only possible remedy in the state where the parties live, in the absence of statute, is an appeal to a court of equity.

And in *Henry* v. *Henry*, supra, a bill was maintained in the chancery court for the primary purpose of obtaining a decree that a divorce which had been granted in another state by fraud, was without force or effect in New Jersey.

And that is the only way that the aggrieved spouse can directly attack, in this state, a divorce granted in another state, and obtain a decision as to whether or not it is to be treated as void and of no effect in this state under the provision of R. S., Chap. 73, Sec. 12.

To deny a wife a judicial ruling on the question whether or not the facts presented in a given case show that a divorce had been granted in another state under such circumstances as rendered it void and of no effect in this state, would be to deny to her the full benefit of that statute, leaving her status to be decided piecemeal, from time to time, as the question should be incidentally presented.

No divorce has yet been granted this defendant in the Florida case, but the spouse who would be defrauded if a divorce should be obtained there is not bound to stand idly by until the defendant actually obtains such a divorce, based on his fraud, but may at once seek relief in a court of equity in this state to restrain him from further prosecuting his case there, since both parties are under the jurisdiction of this court.

Before the enactment of the Married Woman's Acts, a court of equity was able to protect and preserve the rights of a married woman to her separate property, when, because of common-law disability arising from the marriage status, she had no remedy at law. See Story's Equity Jurisprudence, p. 698 *et seq.*; Pomeroy's Equity Jurisprudence, secs. 52 and 1098; and 19 Am. Jur., p. 147, sec. 155.

And now a court of equity, with full equity jurisdiction, and special jurisdiction over fraud, is not so impotent and powerless as to be unable to grant relief to a wife against her husband in the circumstances of this case.

In the second *Kempson* case, the court said:

"The spouse who is domiciled in the state, and who fears irremediable mischief to the marriage relation, is as much entitled to judicial protection as the owner of ordinary property situate within the state."

And in *Gross* v. *Gross*, supra, it was said:

"Since . . . this court may protect the matrimonial res by entertaining a bill to annul such decree if it is obtained, it certainly possesses the power to enjoin the defendant from securing such decree, although no other relief may be asked or granted."

This exception of the defendant must also be overruled.

But a wife is not entitled, as a matter of right, to an injunction against her husband who is domiciled in the same state with her, to restrain him from further prosecuting against her in a state where neither of them dwells, a divorce proceeding based on his false allegation that he resides there.

Each case must be decided upon its own facts, and it is discretionary with the sitting Justice whether an injunction shall be granted or not. *Johnson* v. *Johnson*, supra. See 14 Ruling Case Law, p. 414; also 32 Corpus Juris, p. 116.

And in the absence of an abuse of judicial discretion, the decision of the sitting Justice on that question is not exceptionable.

It does not appear in the final decree before us whether the injunction was granted as a matter of right or of discretion. It is not necessary that it should appear. It is sufficient if the decree can be sustained on any legal ground, and it is not reversible unless plainly wrong, or based on error of law. *Rioux* v. *Portland Water District*, 132 Me., 307, 170 A., 63.

And since it does not appear here that there has been any abuse of discretion in this case, and the final decree not appearing plainly wrong, or based on error of law, the defendant's exceptions cannot be sustained.

Exceptions overruled.
Appeal dismissed.
Decree below affirmed.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

JOHN S. DOW

vs.

LONDON & LANCASHIRE INDEMNITY COMPANY OF AMERICA.

Penobscot County. Decided August 3, 1938. Neither allegation nor prayer is adequate for equitable relief. On this ground, and not on the merits, defendant's appeal is sustained, the decree below reversed, and plaintiff's bill dismissed. So ordered. *Michael Pilot*, for plaintiff. *Reginald H. Harris*, *Ross St. Germain*, for defendant.

GRACE MORRISON *vs.* BARRON FURNITURE COMPANY.

Penobscot County. Decided August 12, 1938. The action is in trover, for the value of certain articles of household furniture: plea the general issue, and averment of absence of title in plaintiff.

Plaintiff's husband, on cross-examination by defendant's counsel, was asked, "You understood perfectly that this was not Mrs. Morrison's first marriage?" Subsequent to objection the court excluded the question, and granted an exception.

The case shows that plaintiff was formerly the wife of a brother of her present husband, and Exhibit C., printed therewith may

somewhere be offered in evidence as tending to prove untrue statements on the part of someone. There is no evidence that the exhibit was offered, identified or used in the case.

The matter inquired into, and bringing up the exception, is evidence incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, title to the property. It is wholly collateral. Exception overruled. *B. W. Blanchard*, for plaintiff. *Harvey D. Eaton*, for defendant.

HENRY J. BARKER

vs.

CARROLL W. PERRY AND WALTER J. BRENNAN.

Penobscot County. Decided November 29, 1938. The plaintiff, a passenger in a Ford truck driven by the defendant Perry, brought suit to recover for personal injuries suffered in a collision with a truck left by the defendant Brennan without lights after dark in the highway. After a verdict for the plaintiff in the sum of $2800, the defendant Perry has filed a motion for a new trial. It is argued that the verdict is against the evidence and that the damages are excessive.

The plaintiff, on November 21, 1934 after his work for the day was finished, asked Perry for a ride to his home. The defendant Brennan had left his truck without lights in the highway just to the right of the center line of the travelled part of the road. As Perry was proceeding in the darkness at a speed of about thirty miles an hour with the plaintiff in the seat beside him, he saw another car approaching. He dimmed his lights and swung to the right. As he did so, the Brennan truck suddenly loomed up in front of him and, before he had time to pull to the left sufficiently to clear it, a collision took place.

Perry maintains that he did everything possible to avoid the acci-

dent and that he was not negligent. The plaintiff contends that the question of Perry's negligence was for the jury.

In considering a motion for a new trial by a defendant the evidence must be viewed in the light most favorable to the plaintiff. *Searles* v. *Ross*, 134 Me., 77, 80, 181 A., 820. Whether Perry, after seeing the approaching car and dimming his own lights, was driving at such a speed that he could bring his car to a stop within the distance illumined by his own headlights, in short whether under the particular conditions then existing he was using due care, was certainly a question for the jury.

The plaintiff's right hip was fractured and the femur broken. He was in the hospital at Millinocket two weeks and was in the Eastern Maine General Hospital for seven months. One leg is shorter than the other and he walks with a limp. He was earning $35 a week, his hospital and medical bills were $940. Damages of $2800 were certainly not excessive. Motion overruled. *Fellows & Fellows*, for plaintiff. *Alan L. Bird*, for defendant.

INHABITANTS OF THE TOWN OF SOLON

vs.

INHABITANTS OF THE TOWN OF WASHBURN.

Somerset County. Decided December 6, 1938. On report. This is an action under the statute (R. S. 1930, Chap. 33, Sec. 29) to recover for pauper supplies furnished to James Mullen. The only issue is his pauper settlement at the time the supplies were furnished. The plaintiffs contend that it was obtained in the defendant town between the early part of June, 1910, and the latter part of October, 1915.

> "A person of age, having his home in a town for five successive years without receiving supplies as a pauper, directly or indirectly, has a settlement therein." R. S. 1930, Chap. 33, Sec. 1, Par. VI.

The age of the alleged pauper is not given nor can it be ascertained by inference from proven facts. Without its inclusion in the record, it is impossible to determine whether Mr. Mullen was "a person of age" during the five years it is claimed he had "his home" in the defendant town. Report discharged. *Butler & Butler*, *Gower & Eames*, for plaintiff. *Bernard Archibald*, for defendant.

PROVEN PICTURES, INC. OF MAINE

vs.

STRAND THEATRE OPERATING CO. ET AL.

Cumberland County. Decided January 18, 1939. In the instant case, the bill of exceptions, although allowed below, presents, in and of itself, no question of law for appellate review.

This Court can not, in acting on the exceptions, consider the report of the evidence, nor the rulings of law, nor the conclusions of law of the justice before whom, jury waived, the trial (subject to reserving exceptions) was, except the evidence and the rulings and conclusions are made a part of the bill of exceptions. They are not so made. There is in the bill no affirmative showing of reversible error. The excepting defendants take nothing by their fatally defective exceptions. *Jones* v. *Jones*, 101 Me., 447, 450, 64 A., 815; *Doylestown Agricultural Co.* v. *Brackett, Shaw & Lunt Co.*, 109 Me., 301, 84 A., 146; *Hurley* v. *Farnsworth*, 115 Me., 321, 98 A., 821; *Feltis* v. *Power Co.*, 120 Me., 101, 112 A., 906; *State* v. *Belanger*, 127 Me., 327, 143 A., 170. Exceptions overruled. *Julius Greenstein*, *Abraham Breitbard*, for plaintiff. *Harry C. Libby*, *Eugene F. Martin*, for defendants.

GEORGE S. HUTCHINS *vs.* RUTH VIRGINIA HUTCHINS.

York County. Decided March 4, 1939. This proceeding was instituted to seek alteration of a divorce decree with respect to alimony and support of children. Hearing was had before a justice of the Superior Court and a modifying decree was made. Exceptions raised the issue that the court had no authority to change the original order of alimony under the statute as it existed at the time the divorce was granted. Inspection of the record shows that the written application to the court for relief, styled a petition, was in legal effect a motion directed to the court seeking a revisal order upon the ground that the income of the libelee had been substantially reduced and he was no longer able to make the required payments. These allegations of fact are not supported by affidavit as required by Rule XVI of the Supreme Judicial and Superior Courts, which reads:

> "No motion based on facts will be heard unless the facts are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed and stated in writing signed by the parties or their attorneys. The same rule will be applied as to all facts relied on in opposing any motion."

Compliance with this rule is a basic requirement to entitle the libelee to a hearing.

> "Courts are bound to take notice of the limits of their authority, and accordingly a court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying proceedings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings." 15 C. J., Courts, Par. 171.

Our Court, in *Emmett* v. *Perry*, 100 Me., 139, 60 A., 872, 873, said:

> "A motion for a new trial on newly discovered evidence is a motion grounded on facts not apparent from the record, and

under Rule 16 of this court should be verified by affidavit in order to entitle it to be considered. This alone is a fatal objection to the plaintiff's motion."

The rules of the Supreme Judicial and Superior Courts were established under authority of R. S., Chap. 91, Sec. 16, and the Supreme Judicial Court is thereby required in precise language to take judicial notice of the rules of the Superior Court.

In *Maberry* v. *Morse*, 43 Me., 176, it was held:

"The rules established in pursuance of this authority, have all the binding and obligatory force of a statute. They are binding on any justice at *Nisi Prius*, or on this court sitting in banc. Neither this court, nor any member, can dispense with or disregard them."

The latest pronouncement of our Court is found in *Cushman Co.* v. *Mackesy et al.*, 135 Me., 490, 200 A., 505, in which it was held that want of jurisdiction is fatal in every stage of the case and may be brought to the attention of the court at any time, although the want of jurisdiction is not specifically set forth in the exceptions, and in that case the lack of verification was held to be fatal.

The mandate will be Proceedings Dismissed For Lack Of Verification Under Rule XVI. *Willard & Willard*, for petitioner. *Bradley, Linnell, Nulty & Brown*, for respondent.

THOMAS A. COOPER, BANK COMMISSIONER IN EQUITY

vs.

FIDELITY TRUST COMPANY IN RE:

PETITION—PINE STATE LOAN & BUILDING ASSOCIATION.

Cumberland County. Decided March 10, 1939. The record in this cause is, in respect to its evidential showing, plainly insuffi-

cient for a decision of this controversy on its merits. It is apparent that the existing deficiency might be supplied. The appeal is therefore dismissed, the decree below vacated, and the case remanded. So ordered. *Albert E. Anderson*, for appellant. *Cook, Hutchinson, Pierce & Connell*, for appellee.

PROVEN PICTURES, INC., OF MAINE

vs.

STRAND THEATRE OPERATING CO., INC. ET AL.

Cumberland County. Decided March 27, 1939. In the Superior Court for the County of Cumberland, at the June Term, 1938, a jury was waived, and the trial of the case was to the judge. He, in vacation, that is to say, between the end of that term of court and the beginning of another term,—more specifically, under date of August 17, 1938,—decided the issue, in the sense of awarding judgment, for the plaintiff.

Counsel for defendants appear to have drafted, signed and verified by affidavit, on September 20, 1938, a motion for a new trial, on the basis of newly discovered evidence. A study of the record does not reveal when the motion was filed in court.

The net of it is that not until the February Term, 1939, which, of judicial knowledge, was the fifth term of court since the date the motion bears, and which was subsequent to the handing down by the Law Court (136 Me., 512, 3 A. [2nd], 650,) of its mandate overruling defendants' exceptions to the rulings and decision of the judge, was an order entered by the Superior Court Justice then presiding, for a commissioner to receive the evidence of sworn witnesses, in support of, and as well against, the allegations of the new-trial motion.

After evidence insisted to support such allegations (opportunity to rebut or impeach which was put aside,) had been taken out, and

a report thereof made and authenticated, the case was transmitted to the instant court. R. S., Chap. 96, Sec. 59. The case has been submitted on briefs, without oral argument.

It is familiar appellate practice, where justice demands such course, to remand causes in order that some defect in the record may be supplied. But, to send this case back, that the record might be put in shape, would do no good in ultimate result.

In the event of a correction of the record, even if the motion for a new trial should be deemed suitable procedure, a point not here raised, the evidence on which the movant relies would be, as to the original issue,—that which the first judge tried and decided,—outside the law's classification of newly discovered evidence.

The motion for a new trial is denied. It is so ordered. *Julius Greenstein, Abraham Breitbard,* for plaintiff. *Harry C. Libby, Eugene F. Martin,* for defendants.

STATE OF MAINE *vs.* HAROLD BARON AND WILFRED HICKSON.

Penobscot. Decided August 14, 1939. Indicted for statutory arson (R. S. 1930, Chapter 130, Sections 1 and 3 as amended, and R. S. 1930, Chapter 138, Section 24), Baron was convicted on all four counts in the indictment, but Hickson only on the counts based on said Sections 1 and 3, the Court instructing the jury that there was not sufficient evidence to justify a verdict of guilty against him on the two counts based on said Section 24, charging in effect wilful burning of property with intent to defraud the insurer.

The property to which it was claimed these respondents set fire was a restaurant and beer parlor known as the "Silver Dollar Grill" situated on Exchange Street in Bangor and "operated" by Baron.

Upon conviction, the respondents filed a motion for a new trial, which was denied by the presiding Justice, from whose ruling the respondents appealed.

No questions of law are presented.

The defense was based largely upon the testimony of the respondents themselves, which apparently the jury did not accept as true, taking into consideration, no doubt, inconsistencies in it and several former convictions of both respondents in the Federal and State courts.

The jury could have found that on the floors of the restaurant, the toilets, and the back room there were in different places paper and rags saturated with oil, and that under some of the paper and rags there was on the flooring a heavy coating of oil as if "poured on"; that also there was a can that had contained considerable gasoline; that there were two distinct fires, one in the restaurant and the other in one of the toilets; that the respondents were together the greater part of the evening and left the restaurant at midnight when they took a waitress to her home; that they immediately returned to and were alone in the restaurant at the time of the fire with the door locked; that upon returning, they parked Baron's automobile on another street some distance from the restaurant instead of in front of it; that they fled from the fire (both running) to Baron's home, leaving the car where it had been parked; that they did not ring in the fire alarm close by; that as to Baron, his motive, not necessary of proof, was to collect insurance money; and that it was a rainy night with few people about and business in general had been poor.

Offered explanation as to these facts the jury could not have credited. In the absence of bias or prejudice, not here appearing, credibility was for that tribunal.

A careful examination of all of the evidence does not warrant this Court in holding that the jury manifestly erred in finding both respondents guilty beyond a reasonable doubt. Appeal dismissed. Judgment for the State. *John T. Quinn*, County Attorney, for the State. *Randolph A. Weatherbee*, for respondent, Harold Baron. *Arthur L. Thayer*, for respondent, Wilfred Hickson.

MERLIN C. JOY *vs.* RALPH A. JEWELL ET AL.

Somerset. Decided September 13, 1939. Appeal dismissed with additional costs.

Decree below affirmed. So ordered. *Paul L. Woodworth*, for plaintiff. *Pattangall, Goodspeed & Williamson*, for defendants.

CHARLES ROSENBLOOM *vs.* LILLIE B. PROUT.

Cumberland. Decided October 4, 1939. At the September Term, 1937, of the Superior Court for the County of Cumberland, the plaintiff entered an action against this defendant to recover for the breach of a contract under seal. At the October Term the action was tried before a jury, and at the close of all the evidence, on the defendant's motion, the presiding Justice directed a verdict for the defendant. An exception was taken by the plaintiff which was not prosecuted, and at the January Term, 1938, judgment was entered for the defendant. April 18, 1938, the plaintiff commenced another action which was entered at the June Term. The defendant's plea was the general issue with a brief statement setting up the former judgment as a bar. The declarations in the two cases are the same; the parties are the same; and the contract sued on is the same contract. The justice who presided at the trial of this second suit ruled that the former judgment was a bar and directed a verdict for the defendant. The case is now before us on the plaintiff's exception to this ruling.

The claim of the plaintiff is that the verdict was directed in the first case because the action was prematurely brought, and that under such circumstances this action is not barred. A careful reading of the record, however, does not disclose on just what ground the ruling of the justice in the first case was based. The presiding Justice in this case well said: "According to the records of the court and the

direction of the directed verdict which has been put in by the plaintiff, the very issue raised in this case here has been passed upon and decided, and I think that brings the case within the rule of estoppel." Exceptions overruled. *Angelo J. Urbano*, *Harry E. Nixon*, for plaintiff. *Richard E. Harvey*, for defendant.

STATE OF MAINE *vs.* RAYMOND F. CUSHING.

Piscataquis. Decided October 4, 1939. The indictment in this case is not within the statute as it read at the time of the commission of the alleged offense.

For such reason, the exception must be sustained, the demurrer adjudged good and the indictment quashed. Exception sustained. Demurrer adjudged good. Indictment quashed. *Judson C. Gerrish*, County Attorney, for State. *James M. Gillin*, for respondent.

ELLEN H. PARKER *vs.* GENEVA VALLERAND ET AL.

Androscoggin. Decided October 4, 1939. No sufficient foundation was laid for this bill in equity under Revised Statutes, Chapter 118, Section 52, *et seq.*, to remove a cloud on the title to certain real estate the real title to which, or to an undivided interest in common therein, plaintiff alleges vested in herself.

A cloud on title is something, such as a mortgage, deed or other instrument, which can be pointed out, and which, as a semblance of title, either legal or equitable, has some appearance of casting a valid objection over the true owner's title.

There was no such showing at the trial below. Exceptions over-

ruled. Appeal dismissed. Decree below affirmed. *Seth May*, for plaintiff. *Clifford & Clifford*, for defendants.

MICHAEL HEBERT

vs.

BISHOP & BABBIN CO. ET AL, TRUSTEES.

Aroostook. Decided January 27, 1940. In assumpsit for the purchase price of a carload of potatoes; plea the general issue, defense being that the purchaser was not the agent of defendant; verdict for the plaintiff.

The case comes up on a general motion for new trial.

The jury heard the testimony. There is evidence to substantiate their finding. Motion overruled. *Arthur J. Nadeau*, for plaintiff. *Pendleton & Rogers*, for defendant.

SARAH F. USEN *vs.* CHARLES W. USEN.

York. Decided February 28, 1940. Appeal and exceptions from rulings and decree of sitting Justice in Equity. The record being insufficient to confer jurisdiction upon this Court to determine the issues raised, the mandate is Appeal sustained without prejudice. Exceptions dismissed without prejudice. Case remanded for further proceedings. *John P. Deering*, *Maurice Caro*, for plaintiff. *Jacob H. Berman*, *Edward J. Berman*, *John W. Hill*, for defendant.

CHARLES L. CUMMINGS ET AL. *vs.* GERRISH MURCHISON ET AL.

Penobscot. Decided April 1, 1940. Real action certified on report on an agreed statement of facts by consent of the parties.

The case shows that on August 26, 1930, Charles L. Cummings of Lincoln, Maine, gave to his wife, Carrie M. Cummings, certain real estate in Lincoln of which he was then seized. The conveyance was made by a warranty deed in the usual form containing, after a description of the real estate, the following provision:

> "It is agreed and understood that any of the above property that may belong to said Carrie M. Cummings at the time of her death shall go to the children of the said Charles L. Cummings. This property is not to be sold by Mrs. Carrie M. Cummings."

Both the grantor and grantee in this deed are now dead. The children of Charles L. Cummings demand the premises conveyed by their father to his wife under the provision of his deed that on her death the property should go to them. The defendants are in possession of the property as tenants of the sole heir of the wife. The issue is whether the demandants have the better title to the lands in controversy upon a proper construction of the grantor's deed.

The majority of the Court are of the opinion that the defendants must prevail. The deed before the Court falls within the rule that a grantor cannot destroy his own grant, and having once granted an estate in his deed, no subsequent clause, even in the deed itself, can operate to nullify it. This rule has been recently restated in *Inhabitants of Canton* v. *Trust Company*, 136 Me., 103, 106, 3 A., 2d., 429; See *Shepherd Company* v. *Shibles*, 100 Me., 314, 61 A., 700; *Maker* v. *Lazell*, 83 Me., 562, 22 A., 474.

The case must be remanded to the Trial Court in which the report originated for entry of judgment for the defendants. So ordered. *Fellows & Fellows*, for plaintiffs. *E. A. Atherton, C. J. O'Leary*, for defendants.

CLIFFORD C. RICHARDSON

vs.

MAINE LOAN AND BUILDING ASSOCIATION.

Cumberland. Decided April 2, 1940. Suit to recover commission for procuring purchaser of real estate. For the same, defendant was also sued by one Sawyer. Both actions, jury waived, were tried together before a Justice of the Superior Court, who found for the defendant in the instant and for Sawyer in his case. Richardson comes up on exceptions to the decision, but they are not properly before us inasmuch as the evidence is not made a part of the bill. *Jones* v. *Jones*, 101 Me., 447, 64 A., 815; *Leathers* v. *Stewart*, 108 Me., 96, 79 A., 16; *Doylestown Agr. Co.* v. *Brackett, Shaw & Lunt Co.*, 109 Me., 301, 84 A., 146.

The situation here is to be distinguished from one in which exceptions are taken to a directed verdict. There a question of law is raised (*Rhoda* v. *Drake, Jr.*, 125 Me., 509, 131 A., 573), and all of the evidence by necessity becomes a part of the case, even though not mentioned in the bill. *People's National Bank* v. *Nickerson*, 108 Me., 341, 80 A., 849; *Williams* v. *Sweet*, 121 Me., 118, 115 A., 895; *Brown* v. *Sanborn*, 131 Me., 53, 158 A., 855; *Bryne* v. *Bryne et al.*, 135 Me., 330, 196 A., 402.

It may be said, however, that the record (evidence is printed therein although not made a part of the bill) discloses ample, credible evidence to support the finding of the justice below. Exceptions overruled. *Clifford E. McGlauflin*, for plaintiff. *Leo G. Shesong*, for defendant.

STANLEY E. WALLACE

DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF

FRED B. REED & COMPANY

vs.

ARTHUR GILLEY AND FIRST NATIONAL BANK OF BATH, TR.

Sagadahoc. Opinion, April 10, 1940. This case comes up on an alleged bill of exceptions. The record is meager in the extreme. It was heard before the court without the aid of a jury and with right of exceptions reserved.

The action is assumpsit for the recovery of a commission alleged to be due the plaintiff, a real estate broker, for securing a purchaser for the defendant's real estate. At the conclusion of the plaintiff's case, the principal defendant rested and, on motion, judgment in his favor was entered.

The bill of exceptions, after a statement of the nature of the action, is as follows:

> "The plaintiff's writ and pleadings, the record of the evidence in the case, and the exhibits are expressly made a part of the bill of exceptions.
>
> "To the allowance of the defendant's motion, the court's ruling and judgment the plaintiff excepts and prays that his exceptions may be allowed.
>
> "The writ was entered at the June Term, 1939; ad damnum $300.00.
>
> "Judgment entered for the defendant, June 21st 1939."

The only ruling on the defendant's motion was the entry of judgment in his favor. With jury waived, a separate ruling on the motion was unnecessary. The ruling made was all inclusive. If there be error, it lies therein.

The exception, however, is not properly presented. It is directed generally and indiscriminately to the judgment below. It is not stated whether the error alleged is based upon the erroneous application of established rules of law, or upon findings of fact unsup-

ported by evidence, or on other exceptionable grounds. It is now settled that the presentation of a mere general exception to a judgment rendered by a justice at *nisi prius* does not comply with the law. *Gerrish, Executor* v. *Chambers*, 135 Me., 70, 79, 189 A., 187; *Dodge* v. *Bardsley*, 132 Me., 230, 169 A., 306. Exceptions overruled. *John P. Carey*, for plaintiff. *Edward W. Bridgham*, for defendant.

QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, APRIL 13, 1940, WITH THE ANSWERS OF THE JUSTICES THEREON

STATE OF MAINE

EXECUTIVE DEPARTMENT

October 13, 1938.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, Section 3, and being advised and believing that the question of law is important and that it is upon a solemn occasion, I, Lewis O. Barrows, Governor of Maine, respectfully submit the following statement of fact and question, and request the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT

Under the provisions of Section 29, Chapter 12 of the Revised Statutes of 1930, the state collects from every corporation, person or association operating any railroad in the state under lease or otherwise, and for the use of the state, an annual excise tax for the privilege of exercising its franchises and the franchises of its leased roads in the state which said tax, together with the tax provided for in Section 4, Chapter 13 of the Revised Statutes of 1930, is in place of all taxes upon such railroad its property and stock.

Said Section 29, Chapter 12, further provides that from the taxes received under the provisions of said Section 29 and the six follow-

ing sections of said Chapter 12, that there shall be apportioned and paid by the state to the several cities and towns in which on the first day of April in each year is held railroad stock of either such operating or operated roads exempted from other taxation as aforesaid, an amount of money determined by a method of computation fully set out in Section 29 and Section 30 of said Chapter 12.

The scope of the present inquiry does not involve the method used in computing the amount to be paid to the various cities and towns out of said excise tax collections, but has to do solely with the question as to whether or not certain stocks owned by the Maine Central Railroad Company and the Cumberland County Power and Light Company, both corporations having a principal place of business in the City of Portland, shall be considered in determining the amount of apportionment to be paid to the said City of Portland. The state treasurer in computing the sums to be apportioned to the City of Portland has not included in his computation three blocks of stock owned by said above mentioned corporations and which were acquired in the following manner:

1. In February, 1912, the Cumberland County Power and Light Company leased the entire transportation facilities of the Portland Railroad Company for a period of 99 years, agreeing to pay as rental, interest on outstanding bonds and dividends of five per cent upon 19,990 shares of common stock then held and owned by individuals and institutions. Since that date the Cumberland County Power and Light Company has operated said railroad company and in the meanwhile has acquired as a result of purchase in the open market a total of 8,032 shares of stock of said Portland Railroad Company. Said lease dated February 1, 1912, provides in Article I, 5th Paragraph as follows:

> "The power company may deduct from the rental payable hereunder any sum or sums equal to the interest or dividends upon any of said bonds or other obligations or stock, the interest or dividends upon which the power company obligates itself to pay by the terms of this lease and which may at the time be held and owned by the power company."

2. The Portland and Rumford Falls Railway owns and formerly operated a line of railroad from Rumford Junction in the City of

Auburn to Rumford. The Rumford Falls and Rangeley Lakes Railroad Company owned and formerly operated the connecting line of railroad from Rumford to Oquossoc. On April 1, 1907, the properties and franchises of these two corporations were leased to the Portland and Rumford Falls Railroad for the term of 1,000 years, the lessee agreeing to pay interest on the bonds of the two lessors, a dividend at the rate of eight per cent a year on the shares of the capital stock of the Portland and Rumford Falls Railway, and at the rate of two per cent a year on the shares of the Rumford Falls and Rangeley Lakes Railroad Company together with certain other payments.

On April 26, 1907, the Portland and Rumford Falls Railroad leased its own property consisting of certain real estate on the water front in Portland, and its franchise to construct a railroad from Rumford Junction to Portland, together with the properties and franchises of its two lessors above named, to the Maine Central Railroad Company for the term of 999 years from May 1, 1907, for a fixed annual rental of $328,000 plus any increase on the rate of interest on the bonds of the lessors when refunded, and certain other charges including income taxes.

In 1934, the Maine Central Railroad Company acquired all of the shares of stock of the Portland and Rumford Falls Railroad, and has also acquired in 1934 and 1935, 19,741 shares of the Portland and Rumford Falls Railway stock out of a total of 20,000 shares outstanding. The acquisition of this stock by the Maine Central Railroad Company was authorized by decree of the Public Utilities Commission of Maine and by the Interstate Commerce Commission in accordance with the terms of the Interstate Commerce Act. By the acquisition of over ninety-five per cent of the stock of the lessors a practical merger was affected and the corporations became affiliated within the meaning of the Internal Revenue laws so that they are now treated as a single unit for the purpose of assessing income taxes, and the incomes are combined in a consolidated return thereby affecting certain substantial savings to the Maine Central Railroad Company.

3. The Maine Central Railroad Company leased the Portland and Ogdensburg Railway on August 20, 1888, for the period of 999 years at a rental of $2 per share of stock. The Maine Central Rail-

road has since the date of said lease acquired a total of 4,184 shares of the stock of the Portland and Ogdensburg Railroad. The reason for such purchase being that the Maine Central Railroad Company considers the stock of the Portland and Ogdensburg Railway for all practical purposes as a capital obligation of the Maine Central Railroad and by owning said stock affects a saving in rental payments.

The above named three blocks of stock were not credited to the City of Portland in computing the amount of said apportionment to be paid to the said city for the year 1937. On the refusal of the treasurer of state to include said stocks in his computation, demand was made by the officials of the City of Portland on the Governor and Council for reimbursement. Before taking any action in said matter the Governor and Council voted that the Governor should seek the opinion of the Justices of the Supreme Judicial Court and secure a ruling which could be used as guidance by the Governor and Council, the treasurer of state and the next session of the Maine Legislature.

QUESTION

In computing the amount to be paid to the City of Portland as its share of the excise tax on railroads collected under the provisions of Section 29, Chapter 12 of the Revised Statutes of 1930, should the Governor and Council include in the apportionment the stocks owned by the Maine Central Railroad Company in its two leased lines, namely, the Portland and Rumford Falls Railroad and the Portland and Ogdensburg Railroad and the shares of stock of the Portland Railroad Company owned by the Cumberland County Power and Light Company as hereinbefore explained?

Very respectfully,

LEWIS O. BARROWS

Governor

STATE OF MAINE

To the Honorable Lewis O. Barrows, Governor:

The undersigned Justices of the Supreme Judicial Court submit, at your request, this advisory opinion.

Railroads and their property and stock, except buildings, and real estate and fixtures lying and being outside located rights of way, are made exempt from municipal taxation.

In lieu, the state levies, for the privilege of operating a railroad, whether by the absolute owner or a lessee, an annual excise tax.

This, in relevancy to instant inquiry, is substantially the expression of the legislative text. See R. S., Chap. 12, Sec. 29; Chap. 13, Sec. 4.

The statute provides, among other matters:

> "There shall be apportioned and paid by the state from the taxes received . . . to the several cities and towns in which, on the first day of April in each year, is held railroad stock of either such operating or operated roads exempted from other taxation, an amount equal to one per cent on the value of such stock on that day, ..." R. S., Chap. 12, Sec. 29, cited before.

The question submitted is resolved, for convenience in here incorporating it, as a background against which to show the answer, thusly:

In apportioning excise taxes, and paying the respective amounts, should those shares of the capital stock of a corporation, which owns but does not operate a railroad, that have been acquired in ownership by and are of the assets of the lessee, the operator of the line or system, be considered as "held" in the city or town, in Maine, of the corporate domicile of the lessee?

The deciding factor is the written will of the Legislature. The intent of such governmental department, embodied in the form necessary so to constitute it, is the law. To that intention, which is to be obtained primarily from the language used, effect, if it does not run counter to some constitutional inhibition, shall be given.

The language of this constitutionally valid statute is plain and unambiguous; adherence to its obvious meaning, which is not de-

void of purpose, would lead neither to injustice nor to contradictory provisions.

Your question must be, and is, answered in the affirmative.

CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER
JAMES H. HUDSON
HARRY MANSER

Justices of the Supreme Judicial Court

November 8, 1938

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta, April 13, 1940.

TO THE HONORABLE THE JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, Section 3, and being advised and believing that the questions of law hereinafter propounded are important, and that it is upon a solemn occasion I, Lewis O. Barrows, Governor of Maine, respectfully submit the following statement of facts and questions, and ask the opinion of the Justices of the Supreme Judicial Court thereon:

STATEMENT.

On April 8, 1940, in the belief that certain facts which had come to my attention as Governor constituted an extraordinary occasion in the contemplation of the provisions of Section 13 of Article V, Part first, of the Constitution of Maine, I issued the following Proclamation:

"STATE OF MAINE

PROCLAMATION BY THE GOVERNOR

WHEREAS, it appears advisable that the Legislature of this State should meet in special session for the following purposes:

To consider legislation relative to unemployment compensation made necessary by certain changes in Federal Social Security Laws.

To consider legislation concerning present laws relating to guaranty of titles of motor vehicles.

To act upon any legislation to promote the welfare of the State.

I, THEREFORE, by virtue of the power vested in me as Governor, convene the Legislature of this State, hereby requiring the

Senators and Representatives to assemble in their respective chambers at the Capitol, at Augusta, on Thursday, the eighteenth day of April, 1940, at ten o'clock in the morning in order to receive such communication as may then be made to them and to consider and determine on such measures as in their judgment will best promote the welfare of the State.

Given at the Office of the Governor at Augusta and sealed with the Great Seal of the State of Maine this eighth day of April, in the year of our Lord one thousand nine hundred and forty, and in the one hundred and sixty-fourth year of the Independence of the United States of America.

(Seal)

By the Governor:

S/ LEWIS O. BARROWS
GOVERNOR

S/ FREDERICK ROBIE
Secretary of State

A true copy:
Attest:
S/ FREDERICK ROBIE
Secretary of State"

Subsequent to said date of April 8, 1940, certain other facts and conditions then unknown to me have come to my attention, knowledge of which facts proves to me the necessity of an intensive investigation of the past and present financial situation of our State Government, and the apparent necessity of certain changes in the statutes in order that similar conditions may not hereafter be permitted to prevail, and it is impossible to complete such investigation and draft such legislation as may be found necessary before the date fixed for the convening of the Legislature in my Proclamation. All of these facts, in my opinion, make the postponement of the convening of a Special Session of the Legislature imperative. On April 10,

1940, I caused to be sent to each member of the Legislature, the following telegram:

> "Legislative session called for April eighteenth deferred by order of Governor stop disregard proclamation sent April ninth
>
> S/ HAROLD I Goss Deputy Secretary of State"

and I am prepared to issue an official Proclamation postponing the convening of the Legislature to a future date to be fixed by me by Proclamation.

My authority as Governor to revoke the beforementioned Proclamation, or to postpone the convening of the Legislature from the date mentioned therein, to some future date to be hereafter fixed by me by Proclamation having been questioned, and important questions of law having arisen relative to the Constitutional rights, powers and duties both of the Governor and the Legislature in this situation,

NOW THEREFORE, I, Lewis O. Barrows, Governor of Maine, respectfully request answers to the following Questions:

QUESTIONS

1. Has the Governor, having issued a Proclamation to the members of the 89th Legislature to convene on April 18, 1940, in Special Session, the power and authority to revoke the Proclamation already made for the convening of the Legislature on April 18, 1940 by another issued prior to the date mentioned for such convening of the Legislature?

2. Has the Governor, having issued a Proclamation to the members of the 89th Legislature to convene on April 18, 1940, in Special Session, the power and authority to postpone the assembling of the Legislature in Special Session to a date to be hereafter fixed by him, by Proclamation issued prior to said April 18, 1940?

Respectfully submitted,

S/ LEWIS O. BARROWS

Governor

To His Excellency, Lewis O. Barrows, Governor of Maine:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answers to the questions propounded to us, bearing date of April 13, 1940.

QUESTION:

1. Has the Governor, having issued a Proclamation to the members of the 89th Legislature to convene on April 18, 1940 in Special Session, the power and authority to revoke the Proclamation already made for the convening of the Legislature on April 18, 1940 by another issued prior to the date mentioned for such convening of the Legislature?

ANSWER:

1. Constitution of Maine, ARTICLE V. — Part First, Sec. 13, provides in part that the Governor "may, on extraordinary occasions, convene the Legislature. . . ." The Governor alone is the judge of the necessity for such action, which is not subject to review. Although there is no express constitutional provision authorizing the revocation of such call, yet such power is necessarily inferable from that clearly granted. The Governor in his discretion may revoke such call by Proclamation issued prior to the convening of the Legislature pursuant to the original Proclamation. Such revocation, if made, would not preclude the Governor from issuing a new Proclamation to convene the Legislature in Special Session at a date certain, if and when, in his judgment, occasion may require, even though such call be for the same cause.

QUESTION:

2. Has the Governor, having issued a Proclamation to the members of the 89th Legislature to convene on April 18, 1940, in Special Session, the power and authority to postpone the assembling of the Legislature in Special Session to a date to be hereafter fixed by him, by Proclamation issued prior to said April 18, 1940?

ANSWER:

2. This question, as we interpret it, is whether the Governor, having issued a Proclamation to the members of the 89th Legislature to convene on April 18, 1940 in Special Session, has the power and authority, without revoking such call, to postpone that convention of the Legislature to an undetermined, future date. Our answer is in the negative, even though the Proclamation for the postponement be issued prior to April 18, 1940. A postponement to an indefinite time is as ineffective as a call to convene at an indefinite time.

Very respectfully,

Signed

CHARLES P. BARNES
GUY H. STURGIS
SIDNEY ST. F. THAXTER
JAMES H. HUDSON
HARRY MANSER
GEORGE H. WORSTER

Dated April 16, 1940.

INDEX

APPEAL.

ARSON.

conviction must rest beyond a reasonable doubt, and the evidence must be sufficient to exclude beyond a reasonable doubt every other reasonable hypothesis except that of the respondent's guilt.

It is not necessary, to constitute arson, that any of the buildings should be consumed. If any part, however small, be ignited, the offense is committed.

State v. *Caliendo*, 169.

ASSAULT AND BATTERY.

At common law, there were no degrees of the offenses of assault or assault and battery, and the term aggravated assault had no technical and definite meaning. The punishment varied according to the discretion of the court, but the grade of the offense was the same.

Strictly, an aggravation of an offense is some act or intent not required to constitute it, but made by law a ground for a higher or increased punishment.

The general statutes of Maine prohibiting criminal assaults and batteries and providing punishment therefor, have followed the common law. R. S. 1930, Chap. 129, Sec. 27.

Whether an assault and battery shall be punished as of a high and aggravated character, depends upon the proof and not the intensity of the allegations.

The degree of the offense in any particular case of assault and battery must depend upon the proof adduced and not upon the facts alleged. The proof may constitute it a felony or only a petty misdemeanor, and upon the proof would depend the measure of the punishment.

The only change made in the general statute by the Amendment of P. L. 1933, Chap. 92, Sec. 6, is that now the maximum punishment which can be imposed for simple assault and battery has been reduced in severity, and the maximum penalty formerly provided for all such offenses is made to apply only to those of a high and aggravated nature. The imposition of sentence, within the statutory limits, is committed to the discretion of the trial judge.

P. L. 1933, Chap. 92, Sec. 6, does not divide assault and battery into separate and distinct crimes, and the rules laid down for charging the offense under the general statute are neither abrogated nor changed by its amendment.

Rell v. *State of Maine*, 322.

BANKS AND BANKING

The legislature intended to prohibit the holding by a savings bank of real estate beyond what should be sufficient for banking rooms as that term is understood by bankers; except that, within limits, real estate acquired by the foreclosure of mortgages thereon, or upon judgments to secure debts are authorized holdings. R. S., Chap. 27, Sec. 30, as amended by Sec. 5, Chap. 222, P. L. 1931.

The law, originally and now, intends to condemn, not only the actual acceptance of bribe money, but the acceptance of a promise to pay such money in order to induce corrupt action by an official.

Generally speaking under bribery statutes there need not be mutual intent on the part of both the giver and the accepter. It is enough that the person accused had the guilty intent.

The guilt of an accused is not measured by the intent of another, but by his own intent.

State v. *Vallee*, 432.

CARRIERS.

Where bill of lading after words "Delivering Carrier" contained words "Central New Jersey, Del.," railroad designated as delivering carrier was entitled only to make terminal service.

Switching service is not a line haul, but is an incident to a line haul.

As concerns interstate commerce, interpretation by the Commission of bills of lading binds State courts.

Martin v. *Canadian Pacific Railway Company*, 10.

Defendant, in its operation of its bus, while acting as a common carrier, owed the duty to a passenger, not as an insurer, but to exercise the highest degree of care compatible with the practical operation of the machine in which the conveyance was undertaken.

To render common carriers of passengers liable for an injury to passengers while under their charge, it is not necessary that they be guilty of gross or great negligence; it is enough if the accident was caused solely by any negligence on their part, however slight, if, by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained.

A carrier of passengers is not responsible for an injury caused by an unforeseen accident against which human care and foresight could not guard and which is not caused in any degree by acts of negligence.

Gould v. *Maine Central Transportation Company*, 83.

A contract carrier, exercising right to load, transport, and deliver goods, does not *ipso facto* become competitor of, and perform substantially same service as, common carrier within statute requiring Public Utilities Commission to prescribe rules for operation of contract carriers in competition with common carriers over highways and minimum contractual rates not less than those of common carriers for substantially same or similar service.

CHATTEL MORTGAGES.

CHEATING BY FALSE PRETENSES.

CHILDREN.

COMMERCE.

COMMON LAW.

CONSTITUTIONAL LAW.

Notice and opportunity for hearing are of the essence of due process of law.

The taking of property without notice and opportunity for hearing violates both the Fourteenth Amendment and Section 6 of Article 1 of the Constitution of Maine, unless the taking constitutes a valid exercise of police power.

The due process clause does not prevent proper exercise of the police power of the state.

"Police power" is the power which the states have not surrendered to the nation, and which by the Tenth Amendment were expressly reserved to the states respectively or to the people.

Private property is held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order or welfare.

One may use his private property in a way so detrimental to the rights of the public with relation to public health, morals, safety, order or welfare as to permit legislative deprivation of such property without compensation. In cases of extreme and urgent necessity, as in conflagrations or epidemics, such property may be destroyed under authority of the police power without notice or hearing.

Whether a particular statute has validity as a proper exercise of the police power depends on whether or not it extends only to such measures as are reasonable, but then the police regulation must be reasonable under all circumstances.

The test used to determine the constitutionality of the means employed by the legislature, in exercising police power, is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes any restrictions on such rights.

The validity of a police regulation primarily depends on whether under all the existing circumstances the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power.

It is only in cases of urgent necessity in the interests of society's right of self-defense that private property may be taken and destroyed or sold without notice and opportunity of a hearing.

Jordan v. *Gaines*, 291.

Under provisions of Federal Constitution declaring that no state shall pass any law "impairing the obligation of contracts" a state to a certain extent and within proper bounds may regulate remedy for enforcement of contract, but if by subsequent enactment it so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests. The constitutional prohibition secures from attack not merely the con-

CONTRACTS.

CORPORATIONS.

See *Ferry Beach Park Assoc. of the Universalist Church* v. *City of Saco*, 202.

When president of a corporation had negotiated with deceased, and with others, over a long period of time, and none of his acts had been questioned by the corporation, and where, in every instance, the acts seem to have been ratified and the corporation had paid deceased large sums of money in carrying out its part of the various agreements, the authority of the president to act for the corporation will be implied.

Where corporation paid deceased, for a period of six years, a large sum of money, in accordance with contract, it must be assumed, until the contrary appears, that those payments were for a valid consideration and were not a wrongful diversion of the corporate funds.

Neely, Adm'x v. *Havana Electric Railway Company*, 352.

Promoters who form a corporation and sell to it property which they themselves own are in a fiduciary position to the company and must make a full disclosure to an independent board of directors of all material facts if the sale is to stand.

A bill in equity brought by preferred stockholders for an accounting should show that the new stockholders either came in contemporaneously with the promoters or at such a time or under such circumstances that they are entitled to be treated as if they had.

The law unquestionably is that the corporation can not for the benefit of its shareholders recover promoters' secret profits if all of the capital stock passed through the hands of the promoters to the public.

A suit to recover promoters' secret profits rests on a different basis from the ordinary stockholders' derivative suit. It is founded on the theory that there is a fraud on the stockholders who subsequently come in to share in the promotional scheme, and that because of such fraud they are permitted to sue either by using the corporate name or in their own names, joining the corporation as a party defendant.

A bill in equity by preferred stockholders, who held no common stock, and who had no right to share in earnings which might accrue over and above the amount necessary to satisfy the dividends on the preferred stock, which alleged that promoters obtained commissions for sale of corporation's preferred stock which was not earned, was insufficient to compel accounting of alleged secret profits of promoters, in absence of showing that preferred stock dividend was thereby impaired.

Jeffs et al. v. *Utah Power & Light Company et al.*, 454.

COURTS.

Statute language is necessarily of prime importance on whether or not the case is properly before the Supreme Judicial Court sitting as a Law Court, and such court has only such powers as are conferred by statute.

Kelley, Appellant from Decree of Judge of Probate, 7.

Revised Statutes, Chapter 91, Section 53, provides that the single justice shall enter a decree in accordance with the certificate and opinion of the Law Court. Such is the extent of power. The justice has no authority to depart in any material respect from the Law Court mandate.

Rose, Adm'x v. *Osborne, Jr.*, 15.

Findings of fact by a Justice presiding in the Supreme Court of Probate are conclusive and not to be reviewed by the Law Court if the record shows any evidence to support them.

Marble et al., Appellants from Decree of Judge of Probate, 52.

It is clear, however, that upon motions presented to the Law Court the doctrine that the decisions of the court stand as precedents for future guidance would apply. While the presiding Justice may under the statute be clothed with discretionary power, yet such authority must be exercised in accordance with settled doctrines enunciated by the Law Court as vital and essential requisites to the proper trial of cases and the administration of justice.

Derosby v. *Mathieu*, 91.

The laws of the United States permit the bringing, in some instances, of suits against national banks whose affairs are being wound up, or the receivers of such banks, in state courts.

It is competent to ascertain, in a state court, the nature and extent of the interest asserted or sought to be acquired, in specific assets in the receiver's hands.

As a general rule, where the court has not jurisdiction of the cause of action or subject matter in a case, such jurisdiction cannot be conferred by consent or agreement.

Consolidated Rendering Company et al. v. *McManus, Receiver*, 192.

See *Usen* v. *Usen*, 480.

CRIMINAL LAW.

Appeal from a conviction of homicide brings up for review only the record in the case, the record, in this sense being inclusive of a stenographic transcript of the testimony upon which the conviction is based.

A conviction may rest on circumstantial evidence.

To justify a conviction on circumstantial evidence, the circumstances relied on must not only be consistent with, and point to the prisoner's guilt, but must be inconsistent with any other rational hypothesis.

In a criminal case it is the province of the jury to settle the facts and determine the reasonable inferences to be drawn therefrom. The jurors are the ultimate, rightful and paramount judges of the facts.

In a criminal prosecution, the law casts upon the state the burden to prove the guilt of the accused, not by a mere preponderance of the evidence, but beyond a reasonable doubt.

As the term reasonable doubt is used in instructing juries in criminal cases, a reasonable doubt is not a vague, fanciful or speculative doubt, but a doubt arising out of the case as presented, for which some good reason may be given, and such a doubt as, in the graver transactions of life, would cause reasonable, fair-minded, honest and impartial men to hesitate and pause.

State v. *Merry*, 243.

Respondent, in criminal action, having been acquitted, is not, from any judicial point of view, aggrieved by ruling as to challenges of jurors.

The penalty of imprisonment for any term of years, and that of imprisonment for one's life, are of different specific significations in the law.

State v. *Dyer*, 282.

Where the intent with which an act made criminal is done forms no part of the offense, it is not necessary to prove any intent in order to justify a conviction.

As to unlawful acts which naturally affect the result of an election, a criminal intent will be presumed.

State v. *Dunn*, 299.

CRIMINAL PLEADING.

It is not a valid objection to an indictment that it embraces in a single count all the particulars in which the defendant is alleged to have sworn falsely where the assignments relate to the same transaction. And one good assignment of perjury will support a general verdict of guilt, although other assignments are defective or not sustained by proof.

The rationale of the rule laid down seems to be that false statements relating to the same transaction, whether one or more, if made under one oath and in one judicial proceeding constitute only one perjury.

When time is not an essential element in the constitution of an offense, it is not necessary to prove that it was committed on the day alleged.

Having elected to prosecute the respondent for a part of his alleged perjury, the State can not now divide the offense with which he is charged "into several parts according to time or conduct for the purpose of basing separate prosecutions upon the various divisions."

State v. *Shannon*, 127.

In criminal pleading, slight defects may be of no invalidating character; nevertheless, essential elements must be set down in the complaint or indictment with some degree of particularity. In asserting any violation of a penal or criminal statute, the instrument must in itself allege whatever is necessary to bring the prosecution within legislative meaning and intent. Nothing can be supplied by intendment, argument or implication.

Seeking necessary information, constituting a criminal charge, investigation is limited to what, as regards the commission of an offense, written accusation apprises.

It is well settled in this jurisdiction that the charge must be laid positively, and not informally or by way of recital merely.

On the criminal side, it is required, as well by the common law as the Constitution, that to bring a case within the law, a sufficient case must be set forth.

State v. *Peterson*, 165.

Formal defects in indictments remain proper subjects of general demurrer, as at common law.

If an indictment contains both good and bad counts, a general demurrer must be held insufficient.

Generally, an indictment for statutory offense must allege all the elements necessary to constitute the offense either in the words of the statute or in language which is its substantial equivalent.

Generally, an indictment for statutory offense committed by officer of election is required to cover only, with time and place, all the material statutory terms and need not be expanded beyond them.

It is never requisite that the indictment should disclose the evidence by which it is to be supported and a negative averment is not usually required to be so full as an affirmative one.

Where the words of a statute may by their generality embrace cases falling within its literal terms, which are not within its meaning or spirit, the indictment must be enlarged beyond the words of its enactment, and allege all facts necessary to bring the case within legislative intent.

State v. *Dunn*, 299.

It has frequently been held that it is sufficient merely to charge the accused with the commission of the crime of "sodomy," or of "the crime against nature," the crime being too well known and too disgusting to require other definition or further details or description.

By reason of the vile and degrading nature of the crime of sodomy, it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required.

Forms used in criminal procedure in Maine have generally included the allegation of force in an indictment charging sodomy, yet it being unnecessary of proof, an indictment which covers all the material statutory terms is sufficient.

State v. *Langelier*, 320.

Under the general statute, an indictment which charged an assault or assault and battery in general terms without specifying the means by which it was accomplished has been deemed sufficient regardless of the enormity of the offense.

Assault and battery, regardless of its enormity, may be charged in general terms without specifying the means by which it was accomplished, and appropriate punishment imposed.

When the law commits to the court a discretion as to the punishment, matter in mitigation or aggravation, to influence such discretion, need not be averred.

Rell v. *State of Maine*, 322.

When a crime is not a continuing offense, it must be charged as committed upon a definite day. The inclusion of a continuando is neither necessary nor in accord with proper pleading. Such inclusion, however, is not fatal to the indictment, since continuando may be treated as surplusage.

Under an indictment charging extortion, an allegation that property intended to be injured was a contract of employment between a certain individual and a county was sufficiently particular.

The respondent is entitled to know, not by implication or intendment, but by direct averment, whether he is accused of misrepresenting the law or of misstating a fact.

State v. *Vallee*, 432.

DAMAGES.

The statute, as it applies in the particular instance, limits redress to compensation of the parents for the pecuniary effect upon them of the death of their child. This does not restrict recovery to the immediate loss of money or property. The words of the statute, allowing damages for "pecuniary injuries," look to the prospective advantages of a money nature, which have, in consequence of the premature death, been cut off.

Sentimental hurts, losses from the deprivation of society or companionship, wounds of the affections, any distress of mind, any grief, suffered by the beneficial plaintiffs, are not elements which may properly find reflection in damages.

A pecuniary loss or damage is a material one, susceptible of valuation in dollars and cents.

The sum given must be the present worth of the future pecuniary benefits of which the beneficiary has been deprived by the wrongful act, neglect or default of the defendant.

Carrier, Adm'r v. *Bornstein*, 1.

The recovery in this case, brought for the benefit of a father and mother to recover damages for death of their son, must be limited to compensation to the parents for the pecuniary effect upon them of the death of their son.

Damages may not be given by way of punishment or through sentiment or from prejudice, but as a pure question of pecuniary compensation for the loss sustained which the jury governed, as a general rule, by probabilities, finds fairly inferable from the evidence.

The sum given must be the present worth of the pecuniary benefits of which the beneficiaries have been deprived by the wrongful neglect of the defendant. Neither loss of the decedent's society and companionship, nor any grief suffered by the beneficiaries has proper place in the award.

In ordinary cases, the compensatory damages which may be awarded under R. S. 1930, Chap. 101, Secs. 9 and 10, as amended, are and must be based solely on probabilities. But when a beneficiary dies *pendente lite*, his death has a controlling influence on the quantum of the recovery for his benefit. His right to compensation for his pecuniary loss vests as of the time of the death of the person killed, not at the time of bringing suit or of recovery.

DEAD BODIES.

DECEIT.

DEEDS.

DIVORCE.

absolutely necessary for jurisdictional purposes, that constitutes fraud and such fraud is sufficient ground for injunctive relief.

A libel for a divorce brought in a court of a distant state, by a resident of this state against another resident thereof, and based on a false allegation of residence in the distant state, causes such unusual hardship to the libelee, and calls for such an expense on her part in order for her to make her defense in the state where the libel is pending, as to render the suit there a harassing and vexatious one.

A valid decree of divorce necessarily carries with it the information that it has been judicially determined that the libelee has violated her marriage vows, and that, within the scope of the allegations in the libel, she has been found guilty of some wrong against the libelant; but a void decree stamps her name with an unmerited disgrace.

If a resident of Maine goes to another state for the purpose of obtaining a divorce from his wife, who is also a resident of Maine, for a cause which occurred while the parties lived together in Maine as husband and wife, there would be an evasion of the laws of Maine, and against its public policy, and a divorce thus obtained would be regarded as void and of no effect in Maine.

That wife has legal defense to husband's contemplated divorce action in foreign jurisdiction does not defeat her right to enjoin action.

Where husband's divorce proceedings in Florida courts were based upon fraud, husband could not defeat wife's suit to restrain husband from prosecuting divorce proceeding on ground that wife had a plain, adequate remedy at law, since special jurisdiction has been conferred upon the court of equity in cases of fraud.

An aggrieved spouse is not compelled to seek the courts of another state for the protection of her marriage status. The court of the state of domicile of the parties is not only able to do that, but has the exclusive right to do it.

A wife who would have been defrauded if her husband had obtained a divorce in Florida courts was not bound to wait until husband obtained divorce, based on his fraud, before seeking relief in equity, especially where both parties were under jurisdiction of Supreme Judicial Court.

A divorce proceeding brought in a sister state by a citizen of Maine against another citizen of Maine is contrary to law and an infringement not only on rights of spouse who has been sued, but also an infringement on the right of the state to determine the matrimonial status of its own citizens.

Usen v. *Usen*, 480.

ELECTIONS.

On call of an election, it is requisite that a warrant issue. In practice, warrants are usually addressed to a constable, who is commanded to warn the voters. It is exacted that the constable make a return.

Without a warrant, an election would not be a legal one. A return, too, is indispensable. Without a return, under the official signature of a constable — his sign-manual — the only competent evidence upon the question of calling the meeting would be lacking. It is the signature of the officer which authenticates a return and endows it with controlling character.

City of Portland v. *Sivovlos*, 4.

EQUITY.

The defense of a new and distinct cause of action set forth in a supplemental bill may be taken advantage of by demurrer when apparent by the bill.

Relief different from that sought in the original may be obtained by a proper supplemental bill, where the cause of action is the same.

While the prayer of a supplemental bill may ask for other and different relief from that demanded in the original bill, the new matter introduced should be such as refers to and supports the case made in the original bill and the prayer should likewise be in furtherance of that case. An inconsistency between the supplemental bill and the original bill either as regards subject matter or prayer is fatal.

Where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle.

A decree must follow the mandate and a single justice can not enlarge or limit or modify the scope of the mandate or hinder or delay its execution.

Rose, Adm'x v. *Osborne, Jr.*, 393.

Objection cannot be made to an amended bill in equity by a demurrer to the bill in its original form.

An appeal from a final decree in equity calls for a review of the whole case, and the appellant is required to present to the appellate court the pleadings, orders, and all evidence before the court below, or an abstract thereof, approved by the justice hearing the case, otherwise the appeal cannot be sustained.

On an appeal in equity, a signed agreement or stipulation of counsel as to what the evidence was at the hearing before the sitting Justice, unapproved, cannot be accepted as a substitute for all evidence before the court below, or an ab-

stract thereof, approved by the justice hearing the case, which is required by statute to be produced.

A final decree in an equity case is limited by the allegations in the bill, and must be based thereon. Such final decree must not only be limited by and based upon the allegations in the bill, but the decree must be supported by allegations sufficient in and of themselves to present a case entitling the plaintiff to the relief prayed for in the bill, and granted in the decree.

It is a general rule that, upon a sufficient showing of facts, a court of equity in any state may enjoin a citizen of that state from prosecuting a suit against another citizen thereof, in the courts of a sister state. In such a case, equity acts *in personam* on the citizen of the state where the court issuing the injunction is located, and without any attempt to interfere directly with the courts of the sister state. This rule has been applied to prevent an evasion of the law of domicile.

This rule is applied in divorce cases where both parties are domiciled in the same state, to restrain the libelant from further prosecuting divorce proceedings which have been commenced by him in a court of another state, based on his false allegation that he resided there. This jurisdiction has been said to rest on the authority vested in the courts of equity.

Full equity jurisdiction was conferred on the Supreme Judicial Court by Chap. 175, Laws of Maine, 1874, and the provisions of that chapter, re-enacted in the various statutory revisions since that time, are now found in R. S., Chap. 91, Sec. 36, Par. XIV.

In construing statute providing that Supreme Judicial Court shall have full equity jurisdiction, "according to usage and practice of courts of equity," in all other cases where there is not a plain, adequate, and complete remedy at law, the quoted phrase was used to direct that the newly granted full equity jurisdiction should be according to usage and practice in equity, rather than according to procedure followed in Supreme Judicial Court in actions at law, and the phrase is not to be construed as a limitation on the grant of full equity jurisdiction, but as a direction as to the course of procedure to be followed.

The full equity jurisdiction of the Supreme Judicial Court is not limited by legislative acts conferring equity powers over certain special subjects, incorporated in statutes enacted before and after the grant of full equity jurisdiction to the Court in 1874, or by a recital of the phrase "in all other causes."

One has no plain, adequate remedy at law if no remedy at law is afforded him in the domestic court of the state where he resides.

A legal remedy, to be adequate, must be one which the domestic courts can apply and does not compel the party to go into the courts of a foreign jurisdiction to avail himself of it. This applies in divorce proceedings.

The statute giving to a wife a right to maintain a bill against her husband when her separate property is involved does not deny wife the right to seek relief in equity against husband on matters not covered by statute.

According to the fiction of the common law, a husband and wife were regarded as one person, yet they have been considered separate persons in equity and also in divorce proceedings.

A court of equity, with full equity jurisdiction, and special jurisdiction over fraud, may grant relief to a wife against her husband where husband was seeking divorce in Florida courts and wife resided in Maine and husband was allegedly domiciled therein, and divorce, if granted, would have been based on husband's fraudulent allegations respecting his residence, and would have adversely affected wife's personal and property rights.

Usen v. *Usen*, 480.

ESTOPPEL.

A waiver is the intentional relinquishment of a known right.

A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. A person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of the right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it.

Waiver may be a question of fact for the jury. It is always so whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence.

Houlton Trust Company v. *Lumbert, Executrix*, 184.

EVIDENCE.

When the superintendent of schools gave specific directions to the plaintiff as to the performance of his duties and he supervised the disbursement of school appropriations, including the payment of teachers, and, for a portion of the school year the plaintiff received his monthly salary, avouched by the superintendent, it must be inferred that he had full knowledge of what was being done and acquiesced in it, and from these facts proven it is entirely proper to draw the inference of plaintiff's employment.

Benson v. *The Inhabitants of the Town of Newfield*, 23.

In a prosecution for arson evidence that the respondent had overinsured his personal property, that insurance carried by his wife who owned the building was excessive, and that respondent's business was not profitable at the time of the fire, was admissible to establish motive, and on a charge of arson based on circumstantial evidence, is of significance in determining the guilt or innocence of the accused. Proof of motive, however, does not alone establish guilt.

Any statement or conduct of a person indicating a consciousness of guilt, where at the time or thereafter he is charged with a crime, is admissible against him on his trial.

Where accused had attempted to procure the absence of witnesses for the State by threats of violence or otherwise, though not conclusive, is a significant circumstance to be weighed by the jury. It is in the nature of an admission of guilt.

Weight of evidence intrinsically destitute of probative value is not enhanced by its admission without objection.

State v. *Caliendo*, 169.

When, at the trial of a criminal case, a witness for the prosecution testifies as to statements of the accused, tending to show that he is guilty, the rule as to the non-permissibility of self-serving statements does not preclude eliciting, on cross-examination of the witness, the whole of the subject matter, even though statements so drawn out are favorable to him.

It is common knowledge, that, in some towns, daylight saving, one hour faster than official time, is, during the summer season, the system of measurement of time.

Evidence of identity, although given positively and directly, is, after all, but the mere opinion of the witness, who should be required to give the facts upon which he based his statement, as the jury have a right to it to aid them in their determination of the matter in issue.

One of the modes of identifying personal property, whether in or out of court, is by appearance of the property itself, but, in this matter, as in many others, the weight of the testimony must generally depend upon the knowledge or familiarity of the witnesses with the subject upon which they speak.

In a criminal case the most accurate expression of identity of articles of a specific kind is to be found by the witness in the general appearance of the property and the witness' opportunities for observing and his attentiveness in observing. In these are found the sources of accurate impression.

State v. *Merry*, 243.

The weight of evidence depends on its effect in inducing belief. The question is not on which side are the witnesses more numerous, but what, in convincing power, is outweighing.

To support a verdict, there must be evidence of real worth. The evidence must be reasonable, and so consistent with the circumstances and probabilities in the case as to, on contrast with and weighing against the opposing evidence, raise a fair presumption of its truth. Overwhelmed by opposing evidence, a verdict cannot stand.

Arnst v. *Estes and Harper*, 272.

The doctrine seems to be settled that pleadings in another suit may be used as admissions of the party, where they bear upon the material issues on trial and appear to have been made by his direction or adoption, shown by prosecuting the action upon them, as the foundation of his claim.

The weight of evidence is for the presiding Justice and in passing upon it, he had the right to take into consideration not only the appearance of the libelant while on the witness stand, and his manner of testifying, but also the probability or improbability of his statement in the light of all of the other facts and circumstances established by proof.

The credibility of the libelant is for the trier of facts, and it was for him to decide whether the libelant's testimony as to his belief in and reliance on the libelee's statement as to the paternity of the child, at the time of their marriage, truly disclosed the state of his mind at that time, or whether it merited unbelief.

Mitchell v. *Mitchell*, 406.

EXCEPTIONS.

Where only one exception was pressed and others seemed to have been waived, discussion, initially, in a reply brief, of the one exception, is out of order.

In murder prosecution, respondent's exception to ruling sustaining objection to question propounded, on cross-examination, of witness could not be sustained where there was no exception directing attention to any ruling which precluded respondent from eliciting any statement which he might have made to witness, and what the witness would have replied had he been allowed to answer was not shown.

State v. *Merry*, 243.

When presiding Justice ruled that a defendant was entitled to a continuance as a matter of right, the ruling was exceptionable as against contention that exception should not be heard because presiding Justice exercised judicial discretion in granting continuance.

When bill of exceptions shows what the issue is and how the excepting party is aggrieved, without so stating that the exceptant is aggrieved, the bill is sufficient.

Where the privilege to present exceptions after the end of the term is not reserved with consent of the parties during the term, they can not be allowed thereafter.

Where nothing in the bill of exceptions shows that privilege to present exceptions after the end of the term is reserved with consent of the parties during the term, the fact that the exceptions were allowed raises a strong presumption that they were properly allowed by the presiding Justice.

When case is heard without the intervention of a jury, exceptions to rulings in matters of law do not lie unless there has been an express reservation of the

Exceptions to findings of fact by a sitting Justice in equity, and to rulings made below as to the legal effect of facts found, can only be considered when accompanied by the evidence or an abstract thereof, approved in proper manner; for without the evidence, the correctness of the findings of fact and the legal effect thereof cannot be determined.

Exceptions lie to the whole or a part of a final decree, under equity procedure in Maine, as regulated by statute, but, on exceptions to such final decree, the allegations in the bill must be accepted as stating the case presented, without right to the exceptor to dispute any statement of facts well pleaded, thus presenting for determination only the questions of law involved.

Usen v. *Usen*, 480.

EXECUTORS AND ADMINISTRATORS.

See In re Estate of Roy H. Neely, 79.

The statutory requirement as to presentment of claims against an estate may be waived.

Testimony of attorney for executrix that executrix was aware of nature of plaintiff's notes and voluntarily paid interest thereon was not privileged as within realm of professional confidence.

A waiver of statutory requirements for presentment of claims against estates of deceased persons can only be made within period for filing of claims.

Evidence concerning knowledge and conduct of executrix in regard to notes after statutory period for filing of claim had expired was admissible, where offered not to show subsequent waiver of requirement for filing claim, but to show acts and conduct consistent with and confirmatory of prior waiver.

Houlton Trust Company v. *Lumbert, Executrix*, 184.

It is well settled that a debt is an asset in the hands of the creditor while living and that on his death it becomes an asset of his estate at the residence of the debtor.

Neely, Adm'x v. *Havana Electric Railway Company*, 352.

In an accurate and legal sense, all the personal property of the deceased, which is of a salable nature, and may be converted into ready money, is deemed "assets," but the word is not confined to such property; for all other property of the deceased which is chargeable with his debts or legacies, and is applicable to the purpose, is, in a large sense, assets.

Legal assets are such as come into the hands and power of an executor or administrator or such as he is intrusted with by law virtute officii to dispose of in the course of his administratorship.

A devise of land after payment of debts, is a charge on the land.

An executor is not chargeable for the proceeds of real estate until the same are in his hands.

"Assets in hand" are such property as at once comes to the executor, or other trustee, for the purpose of satisfying claims against him as such.

Bragdon v. *Smith, Ex'r*, 474.

EXTORTION.

The gist of the crime of extortion lies, not in the nature of the threat, but in the intent to extort money.

The gravamen of the offense punishable by statute concerning extortion is an intent to extort money, and the threat is the manner in which this is to be accomplished.

State v. *Vallee*, 432.

FINDINGS OF FACT.

When a trial by jury is waived and the parties submit their cause to a single Justice, the Law Court has nothing to do with the facts as found. Its only duty is to determine whether the law has been rightly applied to those facts as found by the judicial referee.

So far as relates to the effect of the testimony, if admissible, the judgment of the justice by whom the cause was heard, is conclusive.

Madigan, Receiver of Farmers National Bank of Houlton v. *Lumbert*, 178.

FIXTURES.

Fixture, in law, is a term applied to a thing, originally a personal chattel, of an accessory nature, which, on being physically annexed or affixed, at least by juxtaposition, to realty, for use, has, in intention of its annexer, become part and parcel of the real estate.

Manifest intent, as indicated by proven facts and circumstances, and reasonable inferences, to incorporate the chattel into, and identify it permanently with, what is ordinarily denominated land, a word which includes not only the soil, but everything attached to it, has, in this jurisdiction, come to be recognized as the cardinal rule and most important criterion by which to determine a fixture.

Wedge v. *Butler*, 189.

FORMER JEOPARDY.

It is the supreme law of the land that no person shall be twice put in jeopardy for the same offense, and if the respondent has already been tried and acquitted of the offense now charged in the indictment pending against him, he should not be compelled to again stand trial and be brought into danger of punishment for that offense.

The test to be applied is not merely whether the same evidence supports both charges, or whether more proof might come in on a second trial, but whether the two offenses are essentially independent and hence distinct.

To constitute a bar to the pending indictment against the respondent, it must appear that the former acquittal was for the same offense in law and in fact.

Whether the offenses are the same or different is a question of law.

The State can not divide a single offense into several parts according to time or conduct and base separate prosecutions upon and impose separate punishments for the various divisions.

A prosecution for any part of a single crime bars any further prosecution based on the whole or a part of that crime.

State v. *Shannon*, 127.

GIFTS *CAUSA MORTIS*.

Gifts *causa mortis* "are not to be favored, as they conflict with the general policy of the law relating to the disposition of the estates of deceased persons."

As in gifts *inter vivos*, so in gifts *causa mortis*, it must appear that the donor intends to and does in fact surrender absolutely all present and future dominion and control over the property, "subject in case of a gift *causa mortis* to revocation during lifetime and conditioned upon the death of the donor."

In gifts *inter vivos* and gifts *causa mortis* delivery to the donee is not enough unless accompanied with an intent to surrender all present and future dominion over the property.

In order to make a valid gift *causa mortis* there must be a clear and intelligent manifestation of an intention to make a present gift and the required intention must be definite and certain. The delivery necessary to create such a gift must be such that the donor parts with all present control and dominion over it.

In order to be effectual a gift must be fully executed, for the reason that, there being no consideration therefor, no action will lie to enforce it. If anything remains to be done the transaction is a mere executory agreement to give, and the title does not pass.

Intention to give culminates in a completed gift when title passes on delivery. Before but not after an unconditional delivery, the subject matter of the gift is wholly within the control of the donor.

The finding of fact by the justice below must stand unless it is clearly wrong.

The burden of proving a gift *causa mortis* rests on the one seeking to establish it, and to perform that burden she must produce evidence, clear and convincing.

The mere opening of a joint account, each having an equal right to draw, does not, in and of itself, establish a gift. Where the deposit by a person is in the name of himself and another, the presumption is that it was done for the purposes of convenience only, and this presumption is strengthened by the illness or infirmity of the depositor.

McDonough v. *Portland Savings Bank et al.*, 71.

INJUNCTIONS.

A wife is not entitled, as a matter of right, to an injunction against her husband who is domiciled in the same state with her, to restrain him from further prosecuting against her in a state where neither of them dwells, a divorce proceeding based on his false allegation that he resides there, as each case must be decided upon its own facts, and it is discretionary with the sitting Justice whether an injunction shall be granted or not. In the absence of an abuse of judicial discretion, the decision of the sitting Justice on that question is not exceptionable.

It is not necessary that it should appear in the final decree that injunction was granted as a matter of right or of discretion. It is sufficient if the decree can be sustained on any legal ground, and it is not reversible unless plainly wrong, or based on error of law.

The Supreme Judicial Court has jurisdiction over a husband and wife and their marriage status, as respects wife's suit to restrain husband from prosecuting divorce proceedings in Florida courts, where wife resided in Maine, and husband was allegedly domiciled therein.

Usen v. *Usen*, 480.

INSURANCE.

When the evidence shows that a provision in a liability policy was omitted through mutual mistake, the policy shall be treated as if the provision were a part of it.

That an agent may act for two principals at the same time so as to render them both liable is an exception to the ordinary rule that one can not be the servant of two masters at the same time.

The president of a corporation engaged in the garage business, to which liability policy was issued covering liability of the president, was not covered by policy merely because he may have been exposed to operating hazard of garage business at time of accident, where reference in policy to operating hazard related to method for assessing premium.

JUDGMENTS.

LANDLORD AND TENANT.

LAST CLEAR CHANCE DOCTRINE.

LEASE.

In action by savings bank against devisee under will of mortgagor to recover possession of realty covered by mortgages held by bank, devisee would not be permitted to assert tax title purchased by devisee against the bank, even though devisee was not legally bound to pay the taxes.

York County Savings Bank v. *Wentworth*, 330.

MOTOR VEHICLES.

See *Coffey, Ex'r* v. *Gayton et al.*, 141.

The well-established rule requires gratuitous passengers in automobiles to use ordinary care to warn of apparent danger, but where a passenger goes to sleep while riding in an automobile over the public highways and voluntarily allows a condition to exist which prevents him from using any degree of care or caution, the crux of the matter is whether the passenger, though alert and watchful, could have prevented the negligent act of the driver in colliding with another vehicle. If he could not, then his somnolent condition had no contributory causal connection with the accident.

Wells v. *Sears*, 160.

MURDER.

In Maine, degrees of murder have been abolished. The crime is now defined by statute as the unlawful killing of a human being, with malice aforethought, either expressed or implied.

In murder, malice aforethought must exist, and, as any other elemental fact, be established, not beyond all possible doubt, but beyond a reasonable doubt; malice is not limited to hatred, ill will or malevolence toward the individual slain; it includes that general malignancy and disregard of human life which proceed from a heart void of social duty, and fatally bent on mischief.

Malice aforethought may be expressed or implied. It is express when the wrongful act is done with a sedate and deliberate mind and formed design. It is implied when there is no showing of actual intent to kill, but death is caused by acts which the law regards as manifesting such an abandoned state of mind as to be equivalent to a purpose to murder. Malice includes intent and will.

A wrongful act, known to be such, and intentionally done, without just cause or excuse, constitutes malice in law.

Malice aforethought implies premeditation.

Under the statute, there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. The time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. When the time is sufficient for this, it matters not how brief it is.

On a prosecution for murder, motive — that is, the cause or reason that induced commission of the crime — is not an essential element.

Evidence of motive is admissible for the purpose of furnishing evidence tending to prove guilt, which, in connection with the whole evidence, the jury must consider.

Intent, and not motive, governs. A conviction for murder may be had, where, without reference to the motive which prompted it, there was an intention to do a criminal act.

State v. *Merry*, 243.

NEGLIGENCE.

The mere skidding of a motor vehicle does not of itself prove negligence of the driver. It may occur without fault. The circumstances as to the conduct of the driver taken altogether must be considered.

Marr v. *Hicks*, 33.

The mere fact that the step of an electric car was wet and slippery when the plaintiff alighted did not prove that the defendant was negligent or that the car was defective, without further evidence tending to show the extent and cause of the condition and the length of time it had existed.

Haines v. *Cumberland County Power & Light Co.*, 60.

It is not dangerous to have the windows of a bus open under prevailing weather conditions, unless peril or injury therefrom might have been reasonably anticipated under the circumstances. But whether such peril or injury might have been reasonably anticipated under the circumstances, is a question of fact dependent upon the particular circumstances of the given case.

While it is undoubtedly true that a passenger must take the risks incident to the mode of travel and the character of the means of conveyance which he adopts, such risks are only those which can not be avoided by the carrier by the use of the utmost degree of care and skill in the preparation and management of the means of conveyance.

Failure to submit to the fact-finding jury the questions whether the defendant exercised requisite care in the preparation and management of its bus, with reference to the open window and should have reasonably anticipated to result therefrom peril or injury to its passenger was reversible error.

Gould v. *Maine Central Transportation Company*, 83.

When evidence, viewed in light most favorable to plaintiffs, compels factual findings by impartial reasoning minds that an automobile collision was caused

solely by icy condition of highway and without any negligence by defendant, the court would be required to grant defendant's motion for new trial.

Cases involving injury due to the skidding of an automobile are dependent for decision upon the particular facts shown.

Frye, Lounsbury v. *Kenney*, 112.

The mere fact that a tire has been driven some distance and blows out does not without more render the owner or operator of the automobile liable. The unsafe condition of the tire must be established and that its condition was known to the owner or operator or could have been discovered by the exercise of reasonable care.

Glazer, Chandler v. *Grob*, 123.

Generally, it is a defense to an action of tort that the plaintiff's negligence contributed to produce the injury, but where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant.

Collins v. *Maine Central Railroad Company*, 149.

Contributory or cooperative negligence exists where, but for the negligence or wrong of both parties, there would have been no injury.

Even though negligence of defendant is established, yet it is incumbent upon the plaintiff to prove that no want of due care contributed as a proximate cause of the injury.

An automobile guest is not contributorily negligent in being asleep at time of accident, unless there is causal connection between fact that guest was asleep and accident.

Wells v. *Sears*, 160.

It is negligence to use an instrumentality which the actor knows or should know to be so defective that its use involves an unreasonable risk of harm to others. If the use of the instrumentality threatens serious danger to others unless it is in good condition, there is a duty to take reasonable care to ascertain its condition by inspection.

There is a generally operative duty of inspection where the circumstances are such as would lead a reasonable man to believe that an inspection is necessary, as where the thing used is one likely to deteriorate by previous use or other causes or where the actor has some other reason for suspecting that the article may be defective.

The actor's negligence lies in his act of using the defective instrument without adequate inspection, not in his omission to perform his duty of inspection.

Generally speaking, it is the duty of one operating a motor vehicle on the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to its occupants or to other travellers.

It is common knowledge that defective tires are a frequent cause of blow-outs which have a known tendency to cause the vehicle to swerve and become unmanageable, but the mere fact that a tire blows out does not, without more, render the owner or operator of the automobile liable.

The unsafe condition of the tire must be established and that its condition was known to the owner or operator or could have been discovered by the exercise of reasonable care.

Where the blow-outs result from defects in the tire arising from age or wear, there seems little doubt that responsibility should attend the dereliction of the vehicle owner in using such equipment, if the faults would be disclosed on reasonable inspection.

Dostie, Adm'x v. *Lewiston Crushed Stone Company*, 284.

It is common knowledge that improved highways, even when built of cement, often carry on their surface more or less sand or gravel brought on in the course of travel, as well as small particles of cement loosened by wear or disintegration, all liable to be raised into the air by the winds or the suction of passing travel.

It is equally well settled that the mere fact that the appliances used be the latest achievements of mechanical and scientific skill and are such as are in common use does not conclusively prove that the carrier was not negligent. If the appliances are not suitable for use in the transportation of passengers, it is negligence to employ them for that purpose.

A window in a passenger car or motor bus is an "appliance of transportation."

It is for the jury to determine as a fact whether defendant, in permitting window to remain open, observed that degree of care with which the defendant as a common carrier was chargeable.

Gould et al. v. *Maine Central Transportation Co.*, 336.

Under R. S., Chap. 96, Sec. 50, the person for whose death action is brought is presumed to have been in the exercise of due care at the time of all acts in any way related to his death, and if contributory negligence be relied upon as a defense, it must be pleaded and proved by the defendant.

It is incumbent upon the plaintiff to prove negligence on the part of the defendant. If such negligence is proved, it is incumbent upon the defendant, if he

would avoid liability, to prove contributory negligence on the part of the plaintiff's intestate as a proximate cause of the injury. This shifting of the burden of proof works no change in the underlying principles of law. If the plaintiff's intestate's own want of ordinary care is proved to have been contributory to his death, plaintiff can not prevail.

Unless proven specific acts constitute negligence as a matter of law, then the fundamental rule of due care has application and decision must depend upon the factual situation presented in a given case, and unless conclusion of the jury is so manifestly contrary to the law and the evidence that it clearly could not be reached by reasoning minds, that conclusion must stand.

The underlying and basic rule by which the conduct of the plaintiff's intestate must be determined is whether the facts showed a want of the care which ordinarily prudent men would use under like circumstances.

Foot passengers, in crossing a street, must make such use of their senses as the situation demands. They can not move blindly on, oblivious to everything about them.

Bechard, Adm'x v. *Lake*, 385.

NEW TRIAL

In considering a motion for a new trial the evidence must be viewed in the light most favorable to the plaintiffs. On the defendant is the burden of proving that the jury's verdict is manifestly wrong.

Asserted grounds for a new trial which are not argued must be treated as abandoned.

Marr v. *Hicks*, 33.

The statute authorizing the granting of a new trial, where a party gives to any of the jurors who try the cause any treat or gratuity, makes no distinction as to the time of giving such treat or gratuity so long as it occurred at the same term of court when the case was tried.

In cases where new trials are sought on grounds that a juror or jurors have been given a gratuity, the better practice is to present the motion directly to the Law Court. The motion, however, may be presented to the presiding Justice.

Derosby v. *Mathieu*, 91.

In the absence of exceptions, it is assumed that the issue was stated to the jury with proper instructions.

The Law Court can not substitute its own judgment for that of the jury when there is sufficient evidence upon which reasonable men might differ in their conclusions.

Frye, Lounsbury v. *Kenney*, 112.

NONSUIT.

A motion for a nonsuit is tantamount to a demurrer to evidence.

In ordering a nonsuit for insufficiency of plaintiff's evidence, the court simply declares the law applicable thereto. It says the facts proven fail to cast liability on defendant, but the court does not, nor could, attempt to determine the actual facts of the case, nor is judgment of nonsuit bar to a subsequent action for the same cause.

Where two or more defendants are jointly charged for negligence, and a nonsuit is directed as to one of them, such nonsuit, even if erroneous as to the plaintiff, is not such error as may be invoked by the other defendant for a reversal.

In torts arising out of concurrent negligence, there is an independent as well as a joint liability, and a joint tortfeasor cannot complain that, as to his co-defendant, there has been nonsuit, discontinuance or favorable verdict.

Arnst v. *Estes and Harper*, 272.

ORDINANCES.

According to statute local ordinances must, to be effective, be accepted by the voters, on major vote, at an election which shall have been duly called and sufficiently warned.

City of Portland v. *Sivovlos*, 4.

PARTNERSHIP.

At common law the voluntary assignment of the interest of any member of a partnership at will worked a dissolution.

Section 4 of Chap. 44, R. S. 1930, does not mean that the retiring partner is conclusively presumed to be liable for every debt that the remaining members of the partnership may thereafter contract. The effect of the conclusive presumption in the absence of estoppel is limited to such obligations as could have been lawfully contracted by the partnership had there been no withdrawal of the partner.

A partnership is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business with the understanding that there shall be a community of profits thereof between them.

A partnership is founded in the voluntary contract of the parties as distinguished from the relations which may arise between the parties by mere operation of law independent of such contract. The contract may be either oral or in writing and for no definite length of time.

PAUPERS AND PAUPER SETTLEMENT.

and the nature and extent of relief furnished. The relief must be reasonable and proper under the circumstances and this, in the first instance, must be left to their sound and honest discretion. As officers sworn to do their duty, it is presumed they act with integrity and their conclusions will be respected in law.

The general rule is that the discretionary powers and duties of overseers of the poor are quasi judicial and can not be delegated to others. This rule has been varied in this state only to the extent that it has been settled by a long line of decisions that the overseers of the poor need not act at all times as a body, but that one overseer may furnish poor relief by the express authority of the other overseers and his act, although not authorized, may become the action of the board if approved or ratified.

Overseers of the poor can not delegate the exercise of their discretionary powers to persons not on the board and the provisions of Chapter 65, Private and Special Laws, 1929, which authorize the Town of Fort Fairfield to adopt a town manager form of government and empowered its overseers of the poor to authorize its town manager to act as their clerk or agent to send pauper notices and answers, is not in conflict with this view. The overseers of the poor are not given authority in that statute to delegate their discretionary powers and duties to the town manager or anyone else. The sending of notices and answers is simply a ministerial function. Such ministerial functions may be delegated to an agent or clerk by overseers of the poor.

Inhabitants of Fort Fairfield v. *Inhabitants of Millinocket*, 426.

PERJURY.

Perjury is defined by statute, R. S., Chap. 133, Sec. 1, and except as the statute has enlarged the scope of perjury by including therein corrupt and wilful false oaths and affirmations outside the common-law definition of the crime, it is declaratory, of the common law and must be construed in harmony therewith and as not making any innovation therein which it does not clearly express.

It is settled law that one offense only can be charged in one count of an indictment, but when several acts relate to the same transaction and together constitute but one offense they may be charged in the same count.

In indictments for perjury, it is held that any and all false statements made by a witness under oath may be charged in one count if the statements were given under one oath and in one proceeding.

State v. *Shannon*, 127.

PLEADING AND PRACTICE.

It is well settled that courts have power over their process, and, subject to the rule that there must be something by which to amend, nearly all formal defects

and clerical errors may be amended, not without limitation, but in sound discretion.

Misnomers, a term applied where there is a mistake in the word or combination of words constituting a man's name, and distinguishing him from other individuals, are, within the statute of amendment, correctible.

Discretionary rulings may, on occasion, be reviewed, but not when exercise of the best judgment of the judge upon the occasion that called therefor, was guided by the law.

Collins v. *Bugbee & Brown Company*, 12.

This case was tried on the theory that a valid contract was made with the superintendent of schools and it was not contended that a legal contract could have been made with the school committee. Under these circumstances, the parties must be deemed to have consented to have the matter determined by the Referee as though the declaration had been amended alleging the contract to have been made with the town by its superintendent of schools.

Benson v. *The Inhabitants of the Town of Newfield*, 23.

In actions for injuries sustained as the result of alleged latent defects in steering gear of automobile, declaration failing to allege specifically any defects in steering gear for which vendor was responsible was subject to special demurrer, since defendant was entitled to a definite statement of wherein it was at fault, before being required to answer.

Estabrook v. *Webber Motor Co.*, 233.

A plea in abatement attacks the writ and not the declaration. It does not reach the merits of the case, but rather sets forth a reason why the defendant is not required to plead to the merits. Because of this it is not favored by the court, and it is held that there must be an exact compliance with every requirement of statute or rule, whether of form or substance, or the plea will be overruled on a demurrer.

Motion of defendant, though filed within the time required by the rule, was insufficient as a plea in abatement because it did not conclude with "praying judgment of the writ."

A motion to dismiss reaches only a defect which is apparent on the face of the record.

A defendant, attempting to call court's attention to matter outside record by motion to dismiss action because of defective service of writ, does not lose right to dismissal thereof for defect apparent on inspection of record, as party is barred from taking advantage of defective service only by procedure constituting waiver thereof.

PRESUMPTIONS.

PRINCIPAL AND AGENT.

PRIORITIES.

A claimant is entitled to priority only if and to the extent he is able to trace his property into a product in the hands of the wrongdoer at the time when he seeks to enforce his claim. If at that time the wrongdoer's assets include in one form or another the claimant's property, the claimant is entitled to restitution out of those assets. If the wrongdoer's assets do not include the claimant's property, he is not entitled to priority.

Rose, Adm'x v. *Osborne, Jr.*, 393.

PRIVATE WAYS.

Persons aggrieved by town officers' action in laying out private way over such persons' land should present petition to County Commissioners for relief and appeal from such Commissioners' decision, instead of appealing directly to Superior Court from such action, though such appeal is proper procedure to present question of damages.

Whether persons aggrieved by municipal officers' action in laying out private way over such persons' land have remedy under sections of Revised Statutes providing for appeal to Superior Court depends on the will of the legislature, as expressed in such statute, and original statute may be considered in ascertaining such will, as usually a revision of the statutes simply iterates the former declaration of legislative will.

Connor et al. v. *Inhabitants of Southport*, 447.

PROBATE COURTS

Relative to probate proceedings, the element of the amount of property may not, save for fraud, or defect evident on inspection of the original record, be the subject of collateral attack. The remedy for relief is on appeal.

Decrees of Probate Courts in matters of probate, within the authority conferred upon them by law, are, when not appealed from, conclusive. Such decrees are binding upon the common-law courts, and not reversible by writ of error or certiorari. Nor can they be set aside in equity, even for fraud.

The Probate Court has, after decreeing, and after time for appealing from the decree has passed, the power, upon petition, subsequently filed, notice, and hearing, to open and vacate a prior decree, clearly shown to be without foundation in law or fact and in derogation of legal right.

The Probate Court has jurisdiction as a Court of Equity in specified cases. Such court sits as a Court of Equity only in cases relative to the administration of estates, the execution of last wills, and the performance of trusts.

From that court, an appeal lies to the Supreme Court of Probate.

In re Estate of Roy H. Neely, 79.

A decree of a Justice of the Supreme Court of Probate under the Statutes of Maine can not be reviewed on appeal.

Bronson, Applt., 401.

The presentation of a mere general exception to a judgment rendered by a justice at *nisi prius* is not sufficient under the statute and an exception to a judgment rendered in the Supreme Court of Probate is within the rule.

The findings of a justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. It is only when he finds facts without evidence that his finding is an exceptionable error in law.

Simmons, Applt., 451.

PUBLIC UTILITIES.

Where new schedule of water rates filed by plaintiff company had been made effective by Public Utilities Commission, court could not reinstate a former maximum charge made by plaintiff company.

Where after enactment of Public Utilities law plaintiff company filed schedule which contained no mention of maximum charge allowance, but plaintiff company continued to make such charge until September 1, 1935, when plaintiff company duly filed and placed in effect new rates, water consumers were liable for water in accordance with new rates which were not limited to the prior maximum charge.

Eastport Water Co. v. *Raye et al., Applts.*, 175.

It is a cardinal rule of interpretation applying to writings generally that every phrase must be read in connection with the whole instrument, and particularly in the case of a decree of a court, and an order of the Public Utilities Commission is in that category, that the pleadings, the issues presented, in short the whole proceedings must be considered to determine what the decree was intended to accomplish.

If town feels aggrieved by an order of the Public Utilities Commission fixing rates, it has the right to apply to the commission for a modification of it. So long as it stands, the town is bound by its terms.

Milo Water Co. v. *Inhabitants of Milo*, 228.

When rulings of the Public Utilities Commission are based upon its findings of fact, the Law Court has no right to sustain exceptions on questions of fact if there be any evidence to sustain the findings.

The Public Utilities Commission, upon undisputed facts, is required to interpret the statute and apply the law to the facts, thus presenting a legal question.

RAILROADS.

REFERENCE AND REFEREES.

RES ADJUDICATA.

SALES.

SCHOOLS AND SCHOOL DISTRICTS.

SODOMY.

STATUTES, CONSTRUCTION OF.

The act giving the Old Town Municipal Court exclusive jurisdiction over all criminal offenses and misdemeanors within the jurisdiction of trial justices within the towns enumerated in the act, was repealed *pro tanto* by subsequent general laws authorizing trial of a violator of the inland fish and game laws by any trial justice or any municipal court in the county where the offense was committed or in any adjoining county.

State v. *Carey*, 47.

The intent, rather than the letter of the statute, as the statute itself, read in the light of legislative purpose, expresses such intent, should prevail.

The true meaning of any clause or provision is that which best accords with the subject and general purpose of the statute.

George A. Middleton's Case, 108.

It is apparent that the purpose and intent of the legislature in including Section 3 in Chapter 161 of the Public Laws of Maine, 1929, was only to provide a remedy for persons aggrieved by the action of the municipal officers in improperly discharging, or failing to discharge, the duties required of them by that chapter, and not to provide a remedy for other grievances. The incorporation of that section, as Section 33, in the Revised Statutes, directly following the incorporation therein of the other sections of said Chapter 161, with nothing to indicate any change of intent, other than to substitute Superior Court for Supreme Judicial Court, does not alter or enlarge the scope and meaning that section had when first enacted.

Connor et al. v. *Inhabitants of Southport*, 447.

STATUTE OF FRAUDS.

Tenant's removal of sixty rods of fencing at expense of $25 was not such a "substantial improvement" as would avoid effect of statute of frauds on oral option allegedly given to tenant to purchase farm worth $21,000.

Murphy v. *Federal Land Bank of Springfield et al.*, 381.

STATUTE OF LIMITATIONS.

The statute of limitations does not commence to run against a claim in favor of the estate of a deceased person accruing after death until the appointment of an administrator or an executor.

A cause of action for payments on contracts accruing after death of deceased in 1930, was not barred by limitations, where administration was not taken out until 1937.

Neely, Adm'x v. *Havana Electric Railway Company*, 352.

TAXATION.

Where mortgagee never had seizin or possession of the mortgaged lands, the mortgagors were taxable.

R. S., Chap. 14, Sec. 30, making the owner of a record title to real estate assessable, does not include an obligation of the assessors to make a further examination of the record.

Inhabitants of Town of Canton v. *Livermore Falls Trust Company*, 103.

To exempt property from taxation, the intention of the legislature to exempt it must be expressed in clear and unambiguous terms, that all doubt and uncertainty as to the meaning of a statute is to be weighed against exemption, that taxation is the rule and exemption is the exception.

No uncertainty exists as to the intent of the legislature to exempt household furniture to the aggregate amount of $500. The term is comprehensive instead of particular, generic rather than specific. It refers to articles which, by common acceptation, are included in the general classification. It is not confined to such as may have constituted household furniture at the time of the passage of the statute. The scope of the law is broad enough to include modern inventions which come within its meaning.

The single apartment of an unmarried person may well constitute his abiding place, his home, and contain his household furniture.

A radio intended for the use, comfort, convenience and enjoyment of the owner in his home, is held to be an article of household furniture under provisions of R. S., Chap. 13, Sec. 6. Part IV.

Inhabitants of the Town of Holden v. *James*, 115.

In accordance with legal principles, and the interpretation of the statute as enunciated by our Court, provisions of R. S., Chap. 13, Sec. 6, Subdivision III, is subject to the limitation that the exemption applies only to property occupied by the corporation for its own purposes.

Immunity from assessment depends, not upon simple ownership and possession of property, nor necessarily upon the extent, or length, of the actual occupancy thereof, although this is entitled to consideration, but upon exclusive occupation of such a nature as, within the meaning of the statute, contributes immediately to the promotion of benevolence and charity, and the advancement thereof.

Ferry Beach Park Assoc. of Universalist Church v. *City of Saco*, 202.

In considering application of R. S. 1930, Chap. 13, Sec. 29, heed must be given to conditions which existed at the time of its enactment and to the end which the legislature sought to gain in providing a special method for the taxation of "sailing vessels."

TORTS.

If a trustee, through non-feasance, omits to carry the trust into execution, or through misfeasance he disobeys the directions of the trust, he renders himself in some manner liable to the beneficiary whose rights have been thus violated.

If a beneficiary, of full age and sound mind, acting with full knowledge of the facts of the case and of his rights, and not under the influence of misrepresentation, concealment, or other wrongful conduct on the part of the trustee or another, consents that the trustee or a third person may perform an act or refrain from performing an act, equity will not permit the beneficiary to allege thereafter that the conduct of the trustee or third person to which consent was given was a breach of trust, or amounted to participation in a breach.

The rules for the administration of trusts, established by the trust instrument, statute, and court rules, are solely for the benefit of the cestui. If he voluntarily withdraws from their protection, when fully competent, he ought to be permitted to do so. He can not come into equity and complain of an act which he has expressly sanctioned without violating the "clean hand" doctrine of chancery.

Payments made by a trustee will also be credited to him on his accounting, if, while not made in the execution of powers given him by the settlor, a statute, or the court, they are payments which were approved by the cestui, in advance, or ratified by the cestui, or the court after their making.

A beneficiary who, subsequently to a breach of trust, acquiesces in it, can not maintain a suit for relief against those who would otherwise have been liable. The acquiescence, in order to produce this effect, must take place with full information by the beneficiary of all the facts, and with full knowledge of his legal rights arising from these facts; in short, it must have all the requisites of an acquiescence heretofore described, to defeat the liability of a defaulting fiduciary.

If a *cestui que* trust is a party to, or concurs in, or even assents to, a breach of trust by the trustee, he debars himself thereby of all claim for relief.

A beneficiary who has consented to a breach of trust can not thereafter complain of such breach.

Marble et al., Appellants from Decree of Judge of Probate, 52.

WILLS.

It is the general rule that where the testator's intention clearly appears that a legacy should be paid at all events, the real estate is made liable, on a deficiency of assets.

The residuary clause in a will bequeathing to testator's cousin all the residue and remainder of his property, real, personal and mixed, to have and to hold to him and his heirs and assigns forever, was not a "specific bequest" and was not, therefore, exempt from payment of all debts and legacies, which is the usual burden of residuary bequests.

Though a legatee has the statutory right to bring an action of debt against an executor to recover a specific pecuniary legacy, he is not entitled to judgment unless he proves reception of assets by the executor, making him liable to pay.

Bragdon v. *Smith, Ex'r*, 474.

WITNESSES.

The testimony of a witness as to his belief and motive is not usually, if ever, susceptible of direct contradiction. The fact that the testimony of a party to a suit is not directly contradicted does not necessarily make it conclusive and binding upon the court. It is not to be utterly disregarded and arbitrarily ignored without reason. It should be carefully considered and weighed with all other evidence in the case and with all of the inferences to be properly drawn from facts established by the evidence; but if, on the whole case, it appears that such testimony, is untrue, the court is not required to put the stamp of verity upon it, merely because it is not directly contradicted by other testimony.

Mitchell v. *Mitchell*, 406.

WORDS AND PHRASES.

The word "form" is the antithesis of "substance." Substance is that which is essential. Form relates to technical defects, or noncomformance to mandate. Substance goes to matters which do not sufficiently appear, or prejudicially affect the substantial rights of parties who may be interested therein; not to mere formalities.

Rose, Adm'x v. *Osborne, Jr.*, 15.

"Household furniture" means those things provided for, and appropriated to uses in the house.

Inhabitants of the Town of Holden v. *James*, 115.

As used in R. S., Chap. 29, Sec. 88, as amended by P. L. 1935, Chap. 89, the word "way," save where context indicates otherwise, includes all kinds of public ways.

It may well be that in ordinary vehicular transportation conception, the term route designates an improved highway from town to town or place to place, open generally to the reasonable use of the public, without distinction, for passage and repassage at pleasure.

The word route may aptly have a different sense; route sometimes points out or distinguishes a course, a line of travel or of transit.

State v. *Peterson*, 165.

The word "place" has a wide range of meaning, dependent upon the connection in which it is used, but its dictionary definition, adopted in many decisions, is: "Any portion of space regarded as distinct from all other space, or appropriated to some definite object or use."

Lowden v. *Graham*, 341.

"Extortion," in its general sense, signifies any oppression by color of right; but technically it may be defined to be the taking of money by an officer, by reason of his office, either where none is due, or where none is yet due.

State v. *Vallee*, 432.

WORKMEN'S COMPENSATION ACT.

Where an employee is in fact injured in some way other than that known to him and is awarded compensation simply for the known injury, a decree for such will not conclude him in a later petition for further compensation on account of a previously unknown compensatory injury, even though he should have known of it. Only that decided as to the known injury would be *res adjudicata.*

When the commissioner finds the facts in favor of a petitioner, in the absence of fraud, the finding is final if there is any legal evidence, however slender, to sustain it.

It is undoubtedly true that when a hearing has been had on the merits and a decree either awarding or denying compensation has been entered, the Commission is without power to reopen the case and modify its finding because of error.

While the statute on which this petition is based permits the award of further compensation, yet, it does not go to the extent of making it possible to award such compensation prior to the date of an intervening petition on which a decree is made denying compensation. It does not permit a petitioner to nullify a judgment of non-recovery of compensation to a definite date.

Lynch v. *Jutras et al.*, 18.

When an Industrial Accident Commissioner finds the facts in favor of a petitioner, in the absence of fraud, the finding is final if there is any legal evidence, however slender, to sustain it. It is when the commissioner decides facts without evidence or upon illegal or inadmissible evidence, that an error of law is committed which the court is required to correct.

This rule is not applicable when the finding and decree of the commissioner is against the petitioner.

The great weight of authority sustains the view that the words "arising out of" mean that there must be some causal connection between the conditions under which the employee worked, and the injury which he received.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF THE UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF THE UNITED STATES.

STATUTES OF MO.

PRIVATE AND SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES.

ERRATA.

Substitute "statute" for "statue" in ninth line from top of page 93.

Substitute "R. S. 1930, Chap. 60, Sec. 119" for "R. S. 1930, Chap. 90, Sec. 119" in the fourth paragraph of the headnotes on page 223.